No. 30

October Term, 1913.

IN THE

Supreme Court of the United States.

WILLIAM R. HOPKINS and Others,
Petitioners,

v.

THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,
Respondent.

DAVID W. BELDING and Others,
Plaintiffs,

v.

CHARLES HEBARD,
Defendant.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Brief of the Smoky Mountain Land, Lumber and Improvement Company, Respondent.

JOHN FRANKLIN SHIELDS,
WILLIAM A. STONE,
T. E. H. McCROSKEY,
Counsel for Respondent.

International, 336 Chestnut St.

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IN THE

Supreme Court of the United States.

October Term, 1913. No. 232.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, FRED W. BRUCH, GEORGE REEVES, JOHN MATTHEWS,

Petitioners,

v.

CHARLES HEBARD AND THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT, THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY.

STATEMENT.

During 1895 Charles Hebard, who claimed the lands in dispute under a grant from the State of Tennessee, filed the bill in the original case to restrain trespass and remove a cloud from the title of said lands, in the Court of Chancery, Monroe County, Tennessee, praying that Belding, et al., who were named as defendants and claimed the same lands under a grant from the State of North Carolina, be restrained from cutting timber on the said lands, etc.

During January, 1896, the case was removed upon petition of Belding, et al., to the United States Circuit Court of the Northern Division, Eastern District of Tennessee.

The title to this disputed tract of land turned upon the location of the boundary line between the State of Tennessee and the State of North Carolina. The portion of the said boundary line thus in dispute begins at or near the north bank of the Tennessee River, at a "*spruce pine*" (*hemlock*) *tree,* admitted by all parties to the original case to be a marked fore and aft State Line tree, and runs to a point on the south side of the Tennessee River near the summit of a mountain known as Stratton Bald, being the junction of the Hangover and Fodder Stack Ridges and referred to in the evidence as the "Junction" (R., pp. 336-401, 404-405).

The land in dispute lies immediately south of the Tennessee River and is part of a basin drained by a stream about seven miles long, known as Slick Rock Creek, and containing about 6600 acres. The disputed territory is about one-half mile wide on the north, where it is bounded by the Tennessee River; at about the mid point of the tract, its width is from three to three and one-half miles and then the width gradually narrows to zero at the undisputed point on the south, near Stratton Bald Mountain, called the "Junction" (Hale map, R., p. 754).

Hebard, the Tennessee claimant, contended that the State Line from the said undisputed "spruce pine" State Line tree, on or near the north bank of the Tennessee River, crossed said river direct to a ridge or spur leading up to the Hangover Mountain ridge (which is on the east side of the Slick Rock Creek basin), thence along the said Hangover ridge to the Junction, the undisputed point on the south near Stratton Bald Mountain. This contention of Hebard was

sustained and determined that the lands in dispute were in Monroe County, Tennessee (R., pp. 336-401).

Belding, et al., claimed that the boundary line from the undisputed "spruce pine" State Line tree on or near the north bank of the Tennessee River, followed down the Tennessee River for a half mile, crossing said river to the south side at the mouth of a stream known as Slick Rock Creek, thence following the meanders of said Slick Rock Creek for about five and one-half miles, thence departed from the stream, following a lead or ridge to the westward, to Big Fodder Stack Peak (which is on the west side of said Slick Rock basin), thence to the Junction, the undisputed point near said Stratton Bald Mountain. This contention of Belding, et al., would place the lands in dispute within Graham County, North Carolina (R., pp. 336-401).

The territory now comprising the State of Tennessee was ceded to the United States by the State of North Carolina in 1789. The Cession Act described the eastern boundary line, a portion of which is involved in this case, as follows:

> "Beginning on the extreme height of the Stone Mountain, at the place where the Virginia line intersects it, running thence along the extreme height of the said mountain to the place where the Wautauga River breaks through it; thence a direct course to the top of the Yellow Mountain, where Bright's Road crosses the same; thence along the ridge of said mountain, between the waters of Doe River and the waters of Rock Creek, to the place where the road crosses the Iron Mountain; from thence along the extreme height of said mountain to where Nolinchucky River runs through the same; thence to the top of the Bald Mountain; thence along the extreme height of the said mountain to the Painted Rock, on French Broad River; thence along the highest ridge of the said mountain to the place where it is called the

> Great Iron or Smoky Mountain; *thence along the extreme height of the said mountain to the place where it is called Unicoy or Unaka Mountain,* between the Indian towns Cowee and Old Chota; thence along the main ridge of the said mountain to the southern boundary of this state" (R., pp. 339-401).

The part of the line, which was in dispute and adjudicated by the courts below, is included within the call beginning,

> "thence along the extreme height of the said mountain to the place where it is called Unicoy or Unaka Mountain."

The mountain whose extreme height is to be followed until Unaka Mountain is reached, is the "Great Iron or Smoky Mountain."

The Acts of Congress accepting said cession and creating the State of Tennessee use the same words of description of the eastern boundary line as the Cession Act quoted above, United States Statutes at Large, Vol. 1, pages 106 to 109, and 491 and 492.

The State of North Carolina (during 1819) and the State of Tennessee (during 1820), each enacted a statute authorizing their respective Governors to appoint three commissioners "to settle, run and mark the boundary line between the State of North Carolina and the State of Tennessee, agreeably to the true intent and meaning of the Act of General Assembly of North Carolina, entitled 'An Act for the purpose of ceding to the United States of America certain western lands described therein.'" Revised Statutes of North Carolina (1837) on pages 94 and 95. Acts of Tennessee, 1820, Chap. 22. (The Act of Tennessee uses the word "re-mark" instead of the word "mark.")

The joint commissioners did run and mark the line and each state passed an act ratifying, confirming

and adopting the line as run and reported by the commissioners. Acts of Tennessee, 1821, Ch. 35, p. 45; Iredell & Battle Rev. Statute of North Carolina, p. 96.

The Tennessee confirmatory act is as follows:

"Be it enacted by the General Assembly of the State of Tennessee, that the dividing line run and marked by Alexander Smith, Isaac Allen and Simeon Perry, commissioners for and on behalf of this state, and James Mebane, Montfort Stokes and Robert Love, commissioners for and on behalf of the State of North Carolina, which dividing line, as run by said commissioners, begins at a stone set up on the north side of Cataloochee Turnpike Road, and marked on the west side, Ten., 1821, and on the east side, N. C., 1821; running thence on a southwestwardly course to the Bald Rock, on the summit of the Great Iron or Smoky Mountain, and **continuing southwestwardly on the extreme height thereof to where it strikes Tennessee River**, about seven miles above the old Indian town of Tallassee, crossing Porters Gap at the distance of twenty-two miles from the beginning, passing Meigs' boundary line at thirty-one and a half miles, the Equovettly path at fifty-three miles, and **crossing Tennessee River** at the distance of sixty-five miles from the beginning; **from Tennessee River to the main ridge, and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain**, striking the old trading path leading from the valley towns to the overhill towns, near the head of the west fork of Tellico River, and at a distance of ninety-three miles from the beginning; thence along the extreme height of the Unicoy or Unaka Mountain to the southwest end thereof, at the Unicoy or Unaka Turnpike Road, where a cornerstone is set up marked Ten. on the west side, and N. C. on the east side, and where a hickory tree is also marked on the south side Ten., 101 M., and on the north side N. C., 101 M., being one hundred and one miles from the beginning; from thence a

due course south two miles and two hundred and fifty-two poles to a spruce pine on the north bank of the Hiwassee River, below the mouth of Cane Creek; thence up the said river the same course about one mile, and crossing the same to a maple marked W. D. and R. A., on the south bank of the river; thence continuing the same course due south eleven miles and two hundred and seventy-three poles to the southern boundary line of the State of Tennessee and North Carolina, making in all one hundred and sixteen miles and two hundred and twenty-three poles from the beginning, and striking the southern boundary line twenty-three poles west of a tree in said line marked 72 M., where was set up by said commissioners a square post, marked on the west side Ten., 1821, and on the east side N. C., 1821, and on the south side G., be, and the same is hereby ratified, confirmed and established as the true boundary line between this state and the State of North Carolina" (R., pp. 340-402).

The boundary is described in the North Carolina Confirmatory Act in words identical with those used in the Tennessee act, but concludes with these words:

> "The whole distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree, and mile marked at the end of each mile" (R., p. 340-402).

By a stipulation filed in this case, it is agreed that **the Unicoy or Unaka Mountain is** a part of the main ridge dividing Tennessee and North Carolina at a point **about fifteen miles southwest of any point in dispute in this case.** (Rec., p. 327.)

When the case was placed at issue it was referred to Asbury Wright, Esq., as special master, and his report was submitted July 7, 1898, wherein he found that the Hangover Ridge was the main ridge, that *each* of the lines contended for had trees marked as State Line trees thereon, and that the true boundary

line between the said states, run and adopted by their commissioners of 1821 from the undisputed "spruce pine" fore and aft State Line tree on or near the north bank of the Tennessee River to the Junction, near Stratton Bald Mountain, south of said river, was the line contended for by complainant Hebard, to wit: over Hangover Mountain, and that the disputed territory was therefore located in Monroe County, Tennessee (R., pp. 295, 335-343 and 358-359).

Defendants Belding, et al., filed exceptions to this report which were heard by the United States Circuit Court at Knoxville, Tennessee (Judge Clark sitting), on June 10, 1899, and decree was entered overruling the exceptions and confirming the report of the special master, and entered **a decree setting forth that the titles of complainant Hebard to the lands described in the bill were valid, and that the titles of defendants Belding, et al., were void.** (R., pp. 368-373.)

From this decree an appeal was made to the United States Circuit Court of Appeals for the Sixth District, where the same was heard on March 14, 1900, and decree entered on July 13, 1900, in an opinion by Judge Lurton, in which, with great care, the whole case was reviewed, and the decree of the Circuit Court affirmed (R., p. 400). Hebard v. Belding, et al., 103 Fed. 532.

The decree of the Circuit Court of Appeals was a final decree by a proper court. See United States Judiciary Act of 1891, and also the case *Stevenson v. Fain*, 195 U. S. 166.

After this decree was entered, said Charles Hebard conveyed the lands in dispute together with other land to Blaisdell, et al. (R., p. 565), and Blaisdell, et al., to the Smoky Mountain Land, Lumber and Improvement Company, the appellee in this case (R., p. 569), who therefore claimed the disputed territory under grants from the State of Tennessee, and relying upon

said decree of the United States Circuit Court of Appeals for the Sixth Circuit.

After title was thus decreed to be finally vested in Hebard, said Belding, et al., purported to convey such right and title as they might have to the land in dispute, together with other lands to Hopkins, et al., the appellants in this case. Therefore Hopkins, et al., claim the disputed land under grants from the State of North Carolina, and contrary to the said final decree of the United States Circuit Court of Appeals for the Sixth Circuit.

During December, 1903, or during January, 1904, or during February, 1904, the archivist of the State of Tennessee, in clearing out certain rubbish in the basement of the State House at Nashville, Tennessee, discovered in a barrel, a map purporting to have been made by the joint commissioners of the States of North Carolina and Tennessee, appointed in 1821, and authorized to run, in pursuance of the Cession Act, passed prior thereto, that part of the boundary between said states south of the Pidgeon River (R., p. 639).

This said map is the "newly discovered evidence" urged by complainants as the basis for renewing the original suit by the bill of review now filed.

At the same time and place that the said map was found said archivist found the report of said joint commissioners as to said boundary line (R., p. 639).

On September 25, 1906, application by petition for leave to file bill of review was first made by present petitioners to the United States Circuit Court of Appeals of the Sixth Circuit, and leave was granted to said W. R. Hopkins, et al., to file their petition for bill of review in the United States Circuit Court at Knoxville, Tennessee, in the following words:

> "Without deciding any question which may be involved in the application for leave to file such

a bill, this court for reasons satisfactory now consent that the petitioners may apply directly to said Circuit Court, which court will grant or refuse permission as it may be advised" (R., p. 752).

On August 6, 1907 (more than seven years after final decree was entered by the Circuit Court of Appeals), W. R. Hopkins, et al., presented their petition for leave to file bill of review to the United States Circuit Court at Knoxville, Tennessee (R., p. 421).

On the same date the Circuit Court entered an order that a rule be issued and served on the Smoky Mountain Land, Lumber and Improvement Company to show cause why said petition should not be granted and directing the said company to answer on or before the next rule day. (R., p. 439.)

Leave to file said bill of review was granted by the said United States Circuit Court in an opinion by Judge Clark, who had heard the original case.

The court, in its decision upon petition and answer filed, said:

"It does seem, upon examination of this case, that there is no ground on which the success of the proposed bill of review might finally be expected. The objections which are made to permitting this bill to be filed go to the very merits of the bill, and can, and, in my opinion, should more properly be taken up by demurrer to the bill if filed. If, in the exercise of discretion I refuse to allow the bill of review to be filed, it is not certain that my refusal to do so would be subject to review. On the contrary, if the bill is filed and a demurrer should be sustained to it on the same grounds that are now urged against its filing, the action of the court would be subject to easy review, and so the petitioners for review would suffer no error at the hands of this court that could not be readily corrected.

"In view of these considerations I have determined to allow the bill of review to be filed,

subject, of course, to all legal objections, by demurrer, answer, plea, or otherwise, as the defendants may be advised, and it is ordered accordingly" (R., pp. 468-469).
Thereupon said bill of review was filed.

The case coming on to be heard upon bill of review the United States Circuit Court at Knoxville, the prayer of said bill was denied and the petition and the bill dismissed (September, 1909) by the said court in an opinion by Judge John E. McCall, the pertinent conclusions of which were as follows:

> "An attentive examination of this record leads me to the conclusion that the relief sought by those filing the bill of review should be denied upon more than one of the grounds relied upon by the defendants. I shall content myself, however, with discussing only one of them, and that one goes to the merits of the controversy, and in my judgment, is clearly conclusive of the case.
> . . .
> "Now, what is there in the newly discovered map that would have warranted the Circuit Court in rendering a different decree in the original case and to have found in favor of the defendants in that case?
> "Upon an examination of the newly discovered map, it appears that the State Line crosses the Little Tennessee River at right angles, and at the point where the line first reaches the river, and that it proceeds in a southwesterly direction along the ridge, lying adjacent to and immediately south of the river, towards the Unicoy Mountains. There is a black line upon the newly discovered map, marked 'creek' which forms a junction with the Tennessee River a short distance above where the line crosses the river, and east of the line. But there is no indication upon the map, nor in the report accompanying it that this line ran up said creek for any distance, or that it touches the creek at any point. Indeed, if the line followed either the river or creek for any distance, that fact is not

indicated upon the map, nor is there any reference to such thing in the commissioner's report.

"In order that the map or the report of the commissioners be of any service to the petitioners, it should show that the State Line, after crossing the river, followed Slick Rock Creek, if, indeed, it be Slick Rock Creek that is indicated on the map, to a junction with Little Fodder Stack. From the location of this stream marked 'creek' on the map, considered in the light of all the evidence in the case, I am inclined to the opinion that it is Cheoah River, and not Slick Rock Creek.

"The map and the report upon their faces failing to shed any new light upon the issues in the original case, let us examine the evidence taken upon the issues under the bill of review.

"Here we are met with the testimony of witnesses seemingly of equal credibility and of equal opportunity to know the facts about which they testify that is contradictory and unreconcilable. Instead of elucidating the newly found map, it tends to confuse that which appears upon the face of the map, and also it is confusing in its relation to the evidence and findings in the original case.

"Indeed, if this map sheds any additional light upon the issues, it is to make clearer and more certain the correctness of the conclusion reached in the original case, now under review.

"An examination of the commissioners' map, discloses that the State Line approaches the north bank of the Little Tennessee River, running in a southwesterly direction, crosses it at right angles, leaving the south margin of the river in a southwesterly direction immediately at the point of crossing, and runs along the crest of a ridge toward Unaka Mountain, and in this particular follows the direction of the Cession Act, from the Smoky to the Unaka Mountains, wherein it is provided as follows: 'Thence along the extreme height of the said mountain to the place where it is called Unicoy, or Unaka Mountain.'

"The report of the commissioners and the confirmatory acts of the North Carolina and the

Tennessee Legislatures all use identical language in describing this line from the Tennessee River, to wit: 'From the Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain.'

"This is the course and location given the State Line by the final decree in the original case. There is nothing in the newly discovered evidence to warrant this court in holding that had it been before the court at the original hearing, a different conclusion would have been reached, but, on the other hand, the newly discovered evidence rather tends to strengthen the correctness of the original decree.

"It would require a far stretch of the imagination to hold that the newly discovered map, which is silent on this point, except the use of the word 'creek' is sufficient to warrant the court to reverse the holding in the original case, and write upon the face of the map, and into the commissioners' report, according to the showing on the Burns map, the words: 'Thence along the north bank of the Tennessee River to the mouth of Slick Rock Creek. Thence westerly up said creek with its meanderings about five miles to Little Fodder Stack lead; thence along the extreme height of Little Fodder Stack to Big Fodder Stack; thence along the crest of Big Fodder Stack to its junction with Hangover.' Yet this, in substance, must be done, if the petitioners are granted the relief sought by their bill of review.

"As indicated above, there are other grounds upon which the relief sought by the bill of review should be denied, but I prefer to base my action upon the ground that the newly discovered evidence, if it had all been before the court at the original hearing would not have led the court to a different conclusion than the one reached . . ." (R., pp. 696-704).

Upon appeal, on October 5, 1910, the case came on to be heard in the United States Circuit Court of

Appeals before Hon. Henry F. Severns, the Hon. Loyal E. Knappen and the Hon. A. M. J. Cochran (R., p. 759).

After the case had been argued and submitted to the said Circuit Court of Appeals, complainants, Hopkins, et al., on January 27, 1911, filed in said Circuit Court of Appeals a petition to remit the record to the United States Circuit Court at Knoxville, Tennessee, alleging the discovery of a copy of the field notes of William Davenport, surveyor of the State of North Carolina, on the survey of the State Line between North Carolina and Tennessee in the year 1821 (R., pp. 760-761). The Circuit Court of Appeals permitted each side to take and submit affidavits as to the authenticity of said field notes (R., p. 780) and on May 11, 1911, the Circuit Court of Appeals denied the motion to remit the record (R., p. 839).

And afterwards, October 2, 1911, the Circuit Court of Appeals affirmed the decree of the Circuit Court below with costs on December 1, 1911, and filed an opinion in which, inter alia, the court said:

> "In our opinion, taking into account not only the speculative purchase by appellants, but also the good faith purchase by the Smoky Mountain Company, a case is not presented which appeals to the equitable discretion of the court to allow the review of a decree upon the ground alone of newly discovered evidence. We rest our decision solely upon this proposition. Bearing in mind the rule that this bill of review for newly discovered evidence is not of right, no matter how persuasive of error in the original decree the new evidence may be, and that it should not be allowed if such allowance would result in mischief to innocent parties, and having in view the stability necessary to be afforded to decrees, especially of courts of last resort, where disturbance thereof is not essential to the protection of the real equities of the parties before the court, we think the review asked for should be denied. In our opinion, the

> stability of judgments, and thus the protection of rights acquired in reliance upon them, are such as, under the peculiar circumstances of this case, to make the review asked for inequitable. Nor do we think the situation is changed by the fact of the conveyance by Belding and his associates to the trustees pending the suit, nor by the fact that appellants were negotiating for, and possibly may be said to have had, to some extent, an option for the purchase of the land previous to the final decree. The appellants were not bound to make the purchase until contract therefor was actually made, which was after the decree sought to be reviewed was entered; and the purchase then made, as has been said, was speculative as to the land here involved'' (R., p. 844).

Upon petition for writ of certiorari to this court and granting thereof, said case comes to be heard in this court.

Both complainants and respondents claim the newly discovered evidence—map and report of commissioners—conform to their respective contentions of the location of the said boundary line.

There is pending in this court for hearing a case of original jurisdiction, styled State of North Carolina v. State of Tennessee, in which case the same portion of the State Line is in dispute and it is sought to have this court determine the same, in order to define the jurisdictional boundary of each state.

The questions on the merits of the newly discovered evidence.

Arising from the foregoing statements, are:

Is said evidence of a clear, decisive and controlling character?

If so, does said evidence confirm the conclusion reached in the original case as determined by the master, the Circuit Court and the Circuit Court of Appeals?

Or, does said evidence clearly show that had it been available in the original case, the decree would probably have been reversed?

THE ISSUES OF LAW.

Regardless of the merits of the newly discovered evidence, further questions of law growing out of the foregoing statements of fact are:

First.—Have the petitioners, who purchased the right, title and interest of Belding, et al., to the lands in dispute, after title to said lands had been declared by the decree of the final court to be vested in Charles Hebard, and before the discovery of any new evidence, any interest, under the facts of this case, which gives to them, the petitioners, a right in equity to secure a reversal of said final decree upon newly discovered evidence?

Second.—Can the Smoky Mountain Company, purchaser in good faith of the right, title and interest to said lands, and claiming under Charles Hebard, the successful party in the original suit, after final decree of the final court vesting title in said Charles Hebard, have its title affected by this bill of review, filed by petitioners, and based upon newly discovered evidence, which was not discovered until after the time the Smoky Mountain Company purchased?

Third.—Considering all the circumstances of the case, would not the disturbing at this time of the final decree in the original suit, while benefiting none, excepting those who have suffered no loss, be productive of such mischief and injustice to innocent parties as to require the dismissal of the bill of review?

Fourth.—Are not petitioners barred by the Statute of Limitations of Tennessee, as set forth in section

4848, Shannon's Code of the Statute Laws of Tennessee, wherein it is provided:

> "No bill of review shall be brought or a motion made therefor, except within three years from the time of pronouncing the decree; saving to infants, married women, persons of unsound mind, imprisoned or beyond the limits of the United States, a right to a bill of review within three years after such disability has been removed."

Fifth.—Have not the laches of petitioners been sufficient to bar their right to sustain any benefits from a bill of review, even were the merits of the evidence otherwise sufficient?

Sixth.—Was the Circuit Court of Appeals right in denying the motion to remit the record to the lower court with permission to petitioners to make said evidence a part of the record?

Seventh.—Can the determination of the issue in the case State of North Carolina v. State of Tennessee, a case of original jurisdiction, No. 5 on the docket of this court, have any effect upon the determination of this case now before the court?

MERITS OF THE NEWLY DISCOVERED EVIDENCE.

In order that a bill of review for newly discovered evidence may be permitted to prevail, the new evidence must be vital to the issue and clear, decisive and controlling in character; sufficient in the judgment of the court, had the evidence been available in the original suit the decree would have been reversed.

It is held in the case *Southard v. Russell,* 57 U. S. 566, that newly discovered evidence which goes to impeach the character of witnesses examined in the original suit or the discovery of cumulative (not controlling) evidence of the litigated fact is not sufficient.

It must be different and of a very decided controlling character.

This is further supported by the decision in *Shakers Society v. Watson*, 77 Fed. 515. The original suit had been upon certain promissory notes. Certain memoranda and letters bearing on the merits of the suit were afterwards discovered by the unsuccessful party, and they sought to introduce the evidence by a bill of review. The court held the new evidence offered was merely cumulative, and not controlling in character—at most only increasing a doubt and not sufficient to allow the bill to prevail.

Other decisions in point are:

U. S. v. Throckmorton, 98 U. S. 66;
Craig v. Smith, 100 U. S. 226;
Keith v. Alger, 124 Fed. 35;
Richardson v. Lowe, 149 Fed. 635;
Acord v. Western Pocahontas Co., 156 Fed. 996.

We submit that the newly discovered map does not raise any doubt as to the correctness and justice of the final decree rendered in the original case, but to the contrary the map confirms the conclusion reached by the master, the Circuit Court and the Circuit Court of Appeals.

When the original case was decided, the description of the disputed boundary, as set forth in the Cession Act of 1789; the Acts of North Carolina and Tennessee authorizing the joint commissioners to run and mark the said boundary line according to said Cession Act; the Acts of North Carolina and Tennessee adopting the report of said joint commissioners, and *the fact that the "Slick Rock Creek Line" had more marked trees than* the Hangover Ridge Line, were all exhaustively considered by the master, the Circuit Court and the Circuit Court of Appeals.

When the original case was heard the original report of the commissioners had not been found. The original report of the commissioners was found at the same time and by the same person as was the map now in evidence (R., p. 639). Said report was filed by your respondent and not by petitioners (R., p. 466). The original report is practically identical, in its description of the boundary line, with that contained in the Confirmatory Acts of the State of North Carolina and Tennessee (R., pp. 340-402), which were submitted in evidence in the original case and reads as follows:

> "*To His Excellency Joseph McMinn, Governor of the State of Tennessee:*
>
> "The undersigned Alexander Smith, Isaac Allen and Simeon Perry, commissioners on the part of the State of Tennessee; and James Mebane, Montfort Stokes and Robert Love, commissioners on the part of the State of North Carolina, duly appointed under the authority of the Acts of the Legislatures of the said states respectively; having met at the town of New Port in the State of Tennessee on the sixteenth day of July, A. D. 1821, to settle, run and mark the dividing line between the two states, from the termination of the line run by McDowell, Vance and Matthews in the year of our Lord 1799, to the southern boundary of the said states, respectfully report, That we proceeded to ascertain, run and mark the said dividing line as designated in the XIth Article called the Declaration of Rights, of the Constitution of the State of Tennessee, and in the Act of the General Assembly of the State of North Carolina; entitled 'An Act for the purpose of ceding to the United States of America, certain western lands therein described, passed in 1789: Which said dividing line as run by us, begins at a stone set upon the north side of the Catalauchee Turnpike road, and marked on the west side Tenn. 1821; and on the east side N. C. 1821, running thence a southwestwardly course to the Bald Rock on the summit of the Great Iron or Smoky Mountain, and continuing

southwestwardly on the extreme height thereof to where it strikes Tennessee River about seven miles above the old Indian town of Tel'assee, crossing Porters gap at the distance of twenty-two miles from the beginning; passing Meig's boundary line at thirty-one and a half miles—the Equonettly path at fifty-three miles—and crossing Tennessee River at the distance of sixty-five miles from the beginning. From Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain, striking the old trading path leading from the valley towns to the overhill towns, near the head of the west fork of Telico River, and at the distance of ninety-three miles from the beginning. Thence along the extreme height of the Unicoy or Unaka Mountain to the southwest end thereof at the Unicoy or Unaka Turnpike road, where a corner stone is set up, marked Ten. on the west side and N. C. on the east side; and where a hickory tree is also marked on the south side Ten. 101 M. and on the north side N. C. 101 M. being one hundred and one miles from our beginning. From thence a due course south two miles and two hundred and fifty-two poles to a spruce pine on the north bank of Highwassee River, below the mouth of Caine Creek; thence up the said river the same course about one mile, and crossing the same to a maple marked W. D. and R. A. on the south bank of the river; thence continuing the same course due south eleven miles and two hundred and twenty-three poles to the southern boundary line of the States of Tennessee and North Carolina; making in all one hundred and sixteen miles and two hundred and twenty-three poles from our beginning; and striking the southern boundary line twenty-three poles west of a tree in said line, marked 72 M.—where we set up a square post marked on the west side Ten. 1821; on the east side N. C. 1821; and on the south side G. The said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line

tree; and mile marked at the end of each mile; agreeably to the plats which accompanies this report, and which said plats and report are certified by us in duplicate, one for each of the said states, in the same words, marks and figures; which we respectfully submit to the Governors of the said States of Tennessee and North Carolina.

"Given under our hands at Knoxville in the State of Tennessee on the thirty-first day of August, A. D. 1821.

"A. Smith, Isaac Allen, Simeon Perry, Commissioners of Tennessee; James Mebane, M. Stokes, R. Love, Commissioners of North Carolina" (R., p. 466).

It will be noted that neither of the confirmatory acts of the respective states; nor, the original report of the commissioners; nor, the map makes any reference to any field notes and that the only reference is to natural monuments, and not to courses and distances, until the line reaches the one hundred and first mile, where the line leaves the mountains, from which point the next call is "a due course south" and so continues to the Georgia line.

Observing the map and the original report of the commissioners together, it will be found that pictorially the map closely represents the words of the report.

The report from the beginning point calls for the line "running thence in a southwestwardly course to the Bald Rock *on the summit* of the Great Iron or Smoky Mountain and continuing southwestwardly *on the extreme height* thereof to where it strikes Tennessee River." The map between the beginning point and the Tennessee River conforms to this call, showing the line the entire distance on the crest of the mountains.

The next two calls of the report are "Crossing the Tennessee River" and "from the Tennessee River to the main ridge and *along the extreme height* of the

same to the place where it is called Unicoy or Unaka Mountains." The map conforms to these calls, the line crosses the Tennessee River *direct* (shortest route) from where it strikes the north bank of said river, and, on leaving the south bank of the river the line is shown, by the same character of marking as used on the map north of the river, to be located on the crest of mountains, and the line so continues on the crest of the mountains after leaving the Tennessee River.

The next call of the report is "thence along the *extreme height* of the Unicoy or Unaka Mountain to the southwest end thereof." The map conforms to the call.

At this point the line leaves the extreme heights of the mountains and the next call is "a due course south . . . to . . . the north bank of the Highwassee River below the mouth of Cane Creek." The map conforms to the call.

The next call of the report is: "Thence *up the said river* the same course about one mile and *crossing the same* to . . . the south bank of the river." The map conforms thereto.

The last call of the report is: "Thence continuing the same course due south . . . to the southern boundary line of the States of Tennessee and North Carolina." The map conforms to the call.

The map conforming to the calls of the report as to natural monuments, the report being identical with the description of the calls of the boundary line as contained in the confirmatory acts of the respective states concerned, and all conforming to the calls of the Cession Act of 1789, which says:

> "Thence along the *highest ridge* of said mountain to the place where it is called the Great Iron or Smoky Mountain; thence along the *extreme height* of said mountain to the place where it is called the Unicoy or Unaka Mountain" (R., pp. 399-401),

absolutely confirm the findings of the master, the Circuit Court and Circuit Court of Appeals in the original case.

This was fully recognized by Judge McCall, as stated in the Circuit Court's opinion, where he says:

> "Indeed if this map sheds any additional light upon the issues, it is to make clearer and more certain the correctness of the conclusion reached in the original case, now under review" (R., p. 701).

In the original case, petitioners' grantors, Belding, et al., contended that the true State Line from the marked "spruce pine" tree on the north bank of the Tennessee River followed down the river one-half a mile and crossed the river to the mouth of Slick Rock Creek; thence followed up said creek about five and one-half miles to the lead to Big Fodder Stack, thence followed the Fodder Stack Ridge to the "Junction" near Stratton Bald Mountain, an undisputed point to the south (R., pp. 336-401).

Hence, to be such controlling evidence as to convince the court that the final decree in the original case ought to be reversed, or that said decree was unjust to the Beldings, et al., the newly discovered map must show that the State Line followed down the Tennessee River one-half mile from where said line strikes the north bank of the Tennessee River, thence crossing said river and thence up a creek five and one-half miles, thence up a mountain ridge, etc., *which facts said map does not show, but to the contrary, shows* the boundary line conforming to the line claimed by Hebard, et al., in the original case; conforming to the calls of the Cession Act of 1789; conforming to the calls of the commissioners' report of 1821; conforming to the acts of the States of North Carolina and Tennessee adopting the line run by the said commissioners; conforming to the line decided upon as the true State Line by the

master in the original case, the Circuit Court and the Circuit Court of Appeals, to wit: The map shows the State Line following the crest of mountains on the north side of the Tennessee River to the river, crossing the river direct when it reaches it, that on crossing the river the line is immediately located on the summit of mountains and so continues until the said line reaches a point far south on the "Junction," the undisputed point on the south.

True, where the line strikes the south bank of the river there is a "creek" to the east. As the map shows the line on mountains at this point, the only reasonable interpretation of the map, as the commissioners' report, etc., makes no mention of this stream, is that the line runs on a ridge immediately on crossing the Tennessee, and the "creek" represents some stream east of the Hangover Ridge line.

In further consideration of the merits of the new evidence, we should note the findings of material facts, reported in the original case, which unaffected by the new evidence, continue to be governing facts, to wit:

(1) The location of the boundary line northeast of the Tennessee River was agreed to by each party, and its location shown, by the Hale map filed in the case and inserted in the record at page 754 (R., pp. 336, 401, 404, 405).

(2) A "spruce pine" or hemlock tree, marked as a fore and aft tree on the north bank of the Tennessee River; one-half a mile up said river from Slick Rock Creek is a State Line tree and so marked as to show the State Line crossed the river at that point to a lead of Hangover Mountain (R., p. 405).

(3) At least two trees marked as State Line trees and showing the proper age, were found on the Hangover Ridge (R., pp. 337-409).

(4) *The Hangover Ridge is the main ridge* between the river and the junction, the undisputed point to the south (R., pp. 336, 342, 358).

(5) That the trees marked as State Line trees on the Slick Rock Creek line are more numerous and strangely scattered (R., pp. 337, 342, 408, 409).

With these facts in mind, let us observe the controlling reasons, which the master, the Circuit Court, the Circuit Court of Appeals, in the original case, each respectively have stated governed their decision; that the line over Hangover Ridge is the line run and adopted by the commissioners in 1821. Then let us note whether the newly discovered map shows the location of the boundary line so as to eliminate or neutralize any of the reasons thus given.

The special master, Asbury Wright, in his report, after referring to the various acts describing the line and the evidence, says:

> "It must be kept in mind that these commissioners were not making a new line, but were simply determining the true location of the line fixed by the Cession Act of 1789. They got on the top of the Great Iron or Smoky Mountain, and were then to determine the true location of the line between that point and the Unaka Mountain, and to do so, they were to run along the extreme height of the mountain. They report that they run on the extreme height of the mountain to where it strikes the Tennessee River, and the river being a natural object, permanent and notable, they stopped in their description to call attention, particularly and minutely to the several prominent and notable objects passed. The first reference to the Tennessee River is 'to where it strikes the Tennessee River,' and the next is 'crossing the Tennessee River,' and then the report says, 'from the Tennessee River,' and yet if the line was run up Slick Rock Creek, as contended for by defendants, then either before crossing the river or after-

wards, the line would have had to run down the river one-half mile, and this not in the general course the line was running (southwestwardly), but back at an acute angle to the line run and in a northwest course, and in running down the river and up Slick Rock Creek they would not have been running as the line called to run in the Cession Act, along the extreme height of the mountain to where it is called Unaka, but for one-half a mile would have been running down a large river in the deep gorge cut through the mountain, and for more than five miles up Slick Rock Creek in a basin or valley six miles long and three miles wide, surrounded by mountains from one to three thousand feet high. It would certainly not have been in compliance with the Cession Act. It is true that it is my purpose to determine where they actually run and located the line and not whether they complied with the Cession Act, but I cannot believe that they would abandon the line called for in the Cession Act, and be diverted from their course in this way and make no mention of it in their report. They had just paused in their report to make particular mention of many objects, less prominent and less noteworthy, than either the Tennessee River or Slick Rock Creek. They mention the fact that they reach the Tennessee River, that they cross it and that they leave it, and I do not believe that they would have run down the river for one-half a mile and made no mention of that fact, nor do I believe that they would have run for five miles up Slick Rock Creek, a creek with numerous tributaries, apparently of considerable size, so large in fact, that there is another creek in the same basin called Little Slick Rock, and not have mentioned it in their report. After this call has reached Unaka Mountain they are particular to call attention to every object that could give permanency and notoriety to the location and when the Hiwassee River, which at that point is running the same course as the line they were running and they go up the river about one mile, they call attention to the fact (the river

was then running in their direction. See Government map, Exhibit 'G,' to Dep. H. S. Hayes), and if necessary to call attention to the fact when the river was in direct course, how much more necessary it would have been when by following it the line is deflected and caused to turn back at an acute angle. In running up Hiwassee River they passed the mouth of Cane Creek and they mention this fact, and yet, shall we say they run up Slick Rock Creek for five miles and made no mention of that? As soon as Hiwassee River, by a bend, leaves the general course of the line, being run they leave the river. They were not running with rivers, they were locating a line that was to be run along the tops of mountains. But again, the line runs 'from the Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain.' How shall it get to the main ridge, by running down the river and up Slick Rock Creek to a spur of Fodder Stack and thence to its junction the Hangover? I am satisfied from the proof that the Hangover is the main ridge, and that to get on the main ridge, they would have had to be on the Hangover either before or after its junction with the Fodder Stack, and according to the proof, when they came to the river on the northeast side and looked across, there directly opposite them was a continuation of the same ridge along the height of which they were running. This main ridge was on the southwest side of the river higher than it was on the northeast side and run in the general course of the line they were running. They were locating a line which was to run along the extreme height of the mountains from the Great Iron or Smoky Mountain to the Unaka and at the time the line strikes the Tennessee River they say they are on the extreme height of this mountain and immediately across the river is the same mountain, some higher, but the same, and I think that unquestionably this is the main ridge on which they say they run and located the line.

"There are other reasons disclosed by the record of greater or less weight to the same effect.

"There are more marked trees on the Slick Rock Creek line than on the Hangover, but I am inclined to believe from the record that it would not be safe to attempt to pull this line away from the well defined natural objects to follow marks as shown on either side. This section of country was inhabited by the Indian tribes until 1836 or 1837, and is crossed by numerous trails and paths, and numerous marks are found similar to these State Line marks. The defendants' witness, Patton, testified to following the State Line marks in 1867 along the Fodder Stack lead to within 300 or 400 yards of the head of Little Slick Rock Creek, which would be two or three miles further along this lead than where the defendants' marked line leaves it. There are many ways in which these marks could have been placed there without having been made by these state commissioners, but if made by them it was evidently run as a tentative line and not adopted or reported by them, and if they are to mark the line actually run and adopted, why did they mark so carefully for a mile and a half and then not mark any trees for three or three and a half miles? There was an abundance of timber all the way, that they might have marked" (R., pp. 341-342).

Every reason stated in the above report of the special master for concluding that the line over Hangover Ridge is the line which was adopted by the commissioner applies with equal force and effect to the line as represented on the newly discovered map, which shows the line on the crest of mountains north of and to the Tennessee River, crossing said river direct at the point it strikes the river and on leaving the south bank of the river, is shown on the crest of mountains and so continuing southwardly beyond any point in dispute.

Judge Clark, in his opinion in the original case, said:

"It must not be forgotten, however, that the commissioners in surveying and marking the line, followed the mountain range down to the Tennessee River, and that according to the calls actually made, they would cross that river and proceed along the mountain crest where complainants contend the line is. It was the crest of this same mountain range which brought them to the river, and it was the obvious and conspicuous range to have followed by directly crossing the river and keeping up the previous course. It is extremely difficult to believe that the commissioners at this point would have dropped down the river for half a mile and then followed Slick Rock Creek for a distance of five or six miles without ever making the slightest reference to this water stream. Granting as argued that the creek may, at that time have had no name whatever, nevertheless it would have been so natural and so necessary to avoid misleading, for the commissioners to have said that they changed their course, and instead of going directly across the river went down and then followed a creek or water stream up the valley and then to the ridge which led out to the junction; that it is next to impossible to think that such a deviation as this would have been made without a word to give any indication of the fact. Following the calls as actually given, it would be impossible to run the line as claimed by the defendants" (R., p. 369).

The reasoning of Judge Clark applied to the newly discovered map locates the line shown on the map, over the Hangover Ridge.

Judge Lurton, in his opinion, after stating the facts of the case and referring to the various acts describing the boundary lines, inter alia, says:

"How did the commissioners locate the line between the Tennessee River and the Unaka Mountain? It is to be borne in mind that their authority was to 'settle, run and remark' the line 'agreeably' to the Cession Act. The Tennessee

River was a water course, which cut a deep gorge through the main mountain range which the line was following between the Smoky and Unicoy Mountain. The Cession Act placed the boundary 'along the extreme height of said mountain (that is, the Great Smoky) to the place where it is called Unicoy or Unaka Mountain.' It was the duty of the commissioners to locate the line 'agreeably' to this call. They had been following the extreme height of the ridge between the Smoky and the Tennessee River. The river cut through the ridge by a deep gorge, the mountain on either side gradually lowering and terminating at the river in a bluff.

"The last monument on the northeastern side is a tree marked as a fore and aft tree. A fore and aft tree is a tree in the line, and the chops are on the sides showing the direction of the line. The chops on this tree indicated that the line *there* crossed the river. The general course of the line, as called for by the call which brought the line to the river, was southwesterly, and this course was to be continued to the Unaka. The course would, therefore, require the line to there cross the river, as also indicated by the chops on the tree. The general direction of the Cession Act would keep the line on the extreme height of the mountain ridge or range. Immediately across the river, and in the general course of the line, was the Hangover Ridge. This ridge is joined by another ridge called the Fodder Stack some eight or ten miles southwest. Its height increases after it leaves the river, and the highest points between the river and the junction with the Fodder Stack are the Hangover and Hao Peaks, the former having an altitude of about 4500 feet. From the point where it is joined by the Fodder Stack Ridge or spur, it is admittedly the *main ridge*, and further southwest becomes the Unicoy or Unaka. From the river the general course of Hangover is southwesterly, and, therefore, in the general course of the line as described in the Cession Act. One-half mile below the State Line fore and aft tree, a

creek known as Slick Rock Creek empties into the river on the opposite side. That creek is some eight or ten miles in length, and has one or more branches. A short distance below its mouth a low spur approaches the river, called Slick Rock Spur, being a spur of Fodder Stack Ridge. Some seven miles up the creek another spur of Fodder Stack is found. The basin of the Slick Rock is about eight miles long and three miles wide. It is bounded on the south and southeast by the Hangover Ridge, on the north and northwest by the Fodder Stack Ridge, and on the north and northeast by the Tennessee River and the Slick Rock Ridge. The mountains shutting it in are from 1000 to 4000 feet high, and the basin itself is a rough broken mountain valley, almost impenetrable by man.

"The master reports than the Hangover Ridge was the main or highest ridge, having an average height of 800 feet greater than the Fodder Stack.

"It is admissible, in locating a line where a difficulty exists in identifying monuments, natural or artificial, to run the line in a reverse way if, thereby, doubts may be the better solved.

" 'The footsteps of the original surveyor may be traced backward as well as forward.' *Ayers v. Watson,* 137 U. S. 584, 590; *Simmons Creek Coal Co. v. Doarn,* 142 U. S. 417.

"So any ascertained monument may be adopted as a starting point, where difficulty exists in ascertaining the lines of a survey as actually run. *Ayers v. Watson,* 137 U. S. 584.

"We have two established points in the line as actually run by the state commissioners of 1821, between which points the disputed line exists. One point is the fore and aft tree on the northeastern side of the Tennessee River, and the other is some eight miles southwest from that tree, being the well marked line on the height of Hangover, where a junction is made with the Fodder Stack Ridge. If we reverse the survey and take this junction of the two ridges, or leads, as they are sometimes called, as a starting point in

running backwards, one can not doubt but that the line should follow Hangover to the river. The Fodder Stack Ridge would not be observed by surveyors who had reached that point while following the highest ridge from Unicoy or Unaka, for it branches off several hundred feet below the crest of the Hangover, and the fact that a spur was there could only be learned by going down the mountain from three to four hundred feet. To abandon the Hangover in running backwards would also involve a change in direction from northeast to north, and then northwest and then west, and the Tennessee River would not be reached at all but by again diverging and following one or other of two lateral spurs. This situation is most plainly shown by the map of the appellees, adopted by the master, as correctly showing the general course of the ridges or leads at the locality in question. This map is here shown upon a much reduced scale (R., p. 754).

"If the joint commissioners obeyed the call to follow the highest mountain tops and adhered to the course pointed out in the Cession Act, they undoubtedly located the line on the Hangover; and if we follow the line which they reported and adopted, whether we endeavor to track them backward and forward, we must conclude from the call for the 'main ridge' and 'along the extreme height thereof,' in the act adopting their survey, that they did in fact locate the line on the Hangover, between the river and the junction of the Hangover and the Fodder Stack.

"The Hangover is undoubtedly the 'main ridge' called for in the survey made by the commissioners, and definitely locates the line, unless there appears such definite and positive evidence of another and different actual location of the line as to justify us in finding that the line as described and located by natural monuments is not in fact the line actually run and marked and adopted by the commissioners. Every presumption is that the commissioners obeyed the directions of the Cession Act, and so also every presumption is that

the line as actually run, marked and adopted, was a line which conforms to the call to follow the extreme height of the 'main ridge' from the Tennessee River to Unaka.

"But appellants say that they have shown a well marked line from the mouth of Slick Rock Creek, which follows the meanders of that creek for about seven miles and then runs up a spur of the Fodder Stack and connects with that ridge at the peak called Little Fodder Stack. The Fodder Stack Ridge does not run to the Tennessee River at all. North of the peak called Little Fodder Stack its general course is to the northwest. It can not, therefore, be regarded in any sense as the 'main ridge' called for by the survey of the joint commission, irrespective of the fact already noticed, that its average altitude is about 800 feet less than that of the Hangover, which does start at the river immediately opposite the main ridge on the northeast side of the river, and upon which the line on that side is confessedly located. From the top of Fodder Stack the appellants claim that the State Line runs south with the summit of that ridge to its junction with the Hangover Ridge, which, from there, runs southwest.

"To support this contention, appellants rely upon the fact that between the mouth of Slick Rock and the junction of Hangover and Fodder Stack Ridges they show forty-one trees marked as State Line trees, and from this circumstance they contend that this was a line actually marked by the commissioners and adopted by them as the line, and that the calls for course and the 'main ridge' must yield to the actually marked line.

"That the commissioners marked the line run by them, is made clear by the existence of a marked line over those parts of the undisputed line on either side of the place in dispute.

"The North Carolina Act of 1821, adopting and confirming the survey of the commission, concludes with the words, 'the whole distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line

tree.' These words of description do not appear in the Tennessee Act of 1821, and neither the original report of the commissioners nor the surveyors' field notes are in existence.

"The marked trees on this line are shown by blocking to have been probably made in 1821, and correspond in appearance to those existing in the undisputed line. They are strangely scattered along the line claimed. About one-half of the whole number are found within one and one-half miles of the mouth of the creek. Then for a distance of three and one-half miles not a marked tree is shown, though the line is still in the valley, where there was and is a great abundance of timber. Then, where the line is claimed to have left the creek, there are found a great number of marked trees within a short distance after starting up the spur leading to the Fodder Stack, but from the junction of this spur with the Fodder Stack to the Hangover, only two or three trees are found. It is most difficult to account for this line of marked trees, irregularly as they are grouped. The probabilities are that they were marked by the commission.

"For what purpose, is the question. Their evidential value as establishing the actual State Line is greatly impaired by the following circumstances:

"1. The line thus marked is not upon the course which is called for by the survey as reported and adopted.

"2. It departs from the line of the 'main ridge' called for in the commissioners' survey, and a natural monument of the utmost significance. When a monument, natural or artificial, is called for and its identity is doubtful, great importance may be properly attached to an actually marked line upon the ground.

"But in this instance there was no reasonable doubt as to the identity of the 'main ridge' called for in the commissioners' survey.

"The greater altitude of the Hangover Ridge, as well as its general course, makes it most clear

that there could have been no difficulty in determining that the Hangover and not the Fodder Stack was the 'main ridge.'

"It is, therefore, not a case of ambiguous calls or doubt as to the identity of a natural monument in the description. The indisputable facts that the Hangover is much the greater in elevation, was in the direct course called for by the Cession Act, and was indicated by the chops on the established monument on the north side of the river, leave no reason for supposing that the commission mistook the Fodder Stack Ridge as the 'main ridge,' and undertook to reach it by a line up the creek.

"3. If we adopt the Slick Rock Creek line, we must believe that the commissioners not only turned down the river at an acute angle from the course they had been following, followed the river for half a mile, and yet made no call in their report which would indicate such a departure, or that the river was made the boundary for any part of the line.

"4. We must also believe that instead of following a mountain boundary, which according to the Cession Act, ran with the summits of the highest mountains, they deliberately abandoned the heights of the mountain ranges and followed a water course from its mouth for seven miles, and yet made no mention of this natural object in their report whatever.

"5. The significance of these trees as marking the State Line is also affected by the fact that other trees similarly marked are found on the Fodder Stack Ridge, which, confessedly, are not upon any line now claimed as the actually located State Line. The surveyors who testify to such trees express the opinion that they were marked to designate Indian trails. As this whole region was the habitat of the Cherokee Indians at the time of this survey, in 1821, it is altogether possible that all of this marking was done by the Indians as mere trail marks, or in a spirit of imitation, though the stronger probability is that it was tentatively marked and then abandoned for the

Hangover lime, as the one indicated by the Cession Act, andl the report made accordingly.

"6. But the significance of the marked trees on the Slick Rock Creek line is also weakened greatly by tlhe fact that two, and possibly three, old marked State Line trees are found on the Hangover lime. One of these trees is a black or red oak, andl the other a sourwood. These trees stand on the summit of the Hangover Ridge. The question as to whether they bore the proper marks for State Line trees, marked in 1821, was much controverted. The master, after seeing and hearing most of the witnesses and weighing the evidence and seeing the blocks cut from the oak, reached the conclusion that the marks were State Line marks made in 1821, and so reported. . . .

"We have then two lines run and marked. One is the better marked, possibly because it passed through more timber and timber better adapted to carry the marks than the other which followed a rocky, barren, mountain ridge, where the trees, as shown by the evidence, were scrubby and scarce. The other line, though more scantily marked, is found just where the course and natural monuments called for in the report of the survey would locate the line if neither had been marked. That the line ought to run on the extreme height of the Hangover Ridge from the Tennessee River to the Unaka Mountain, if the calls of the confirmatory boundary acts of both states are to control, is most evident.

"The order of applying descriptions of boundaries is first to natural objects, course and distances. . . .

"The description of the boundary as run and marked by the commissioners, calls for a course from one natural object, the Tennessee River, to another, the Unaka Mountain. In the absence of any further description the line should be run straight from one monument to the other. 3 *Washburn Real Estate*, side page 632; *Burnett v. Jones*,

6 Jones (Law), N. C. Rep. 210; *Jenks v. Morgan*, 6 Gray, 448; *Caraway v. Chancey*, 6 Jones, 364.

"The first call in the boundary act of both states is 'from the Tennessee River to the main ridge.' There are no words of intermediate description. The line should therefore be a straight one from the last monument on the river, the fore and aft pine tree, to the 'main ridge.' There being no possible doubt as to the identity of the 'main ridge' referred, to, there can be no doubt on the face of the description following, that the line should then run 'along the extreme height of the same' to the next natural monument, to wit, 'to the place where it is called the Unicoy or Unaka Mountain.' Finding, as we do, upon the line thus located by identified natural objects, two old State Line marked trees, marked, as shown by blocking and examining the annular growth, in 1821, we have no difficulty in agreeing that the line, as run and marked by the commissioners in 1821, was the Hangover line, as founded by the special master and as claimed by the appellees. The probabilities are that the surveyors tentatively or experimentally marked the line up Slick Rock Creek. Discovering that thereby they made a radical departure from the 'extreme height' of the mountain chain called for by the Cession Act of 1789, they abandoned the creek and ran, adopted and reported the line as running along the extreme height of the 'main ridge,' now known as Hangover Ridge. This is the only reasonable explanation consistent with the absence of descriptive words calling for a line running down the Tennessee River and then up Slick Rock Creek" (R., pp. 405-411).

The map of 1821 shows the boundary line between the two states located over the Hangover Ridge for the very reasons stated by Judge Lurton in the above opinion.

Upon petitioners being allowed to file their bill of review in the United States Circuit Court, Judge

Clark (whose opinion is quoted from above, and who also heard and wrote the said court's opinion in the original case), said:

> "It does seem, upon examination of this case, that there is no ground on which the success of the proposed bill of review might finally be expected" (R., p. 468).

Upon hearing and determination of bill of review proceedings in the said Circuit Court, Judge McCall, in his opinion thereon, states:

> "Now, what is there in the newly discovered map that would have warranted the Circuit Court in rendering a different decree in the original case and to have found in favor of the defendants in that case?
>
> "Upon an examination of the newly discovered map, it appears that the State Line crosses the Little Tennessee River at right angles, and at the point where the line first reaches the river, and that it proceeds in a southwesterly direction along the ridge, lying adjacent to and immediately south of the river, towards the Unicoy Mountains. There is a black line upon the newly discovered map, marked 'creek' which forms a junction with the Tennessee River a short distance above where the line crosses the river, and east of the line. But there is no indication upon the map, nor in the report accompanying it, that this line ran up said creek for any distance, or that it touches the creek at any point. Indeed, if the line followed either the river or creek for any distance, that fact is not indicated upon the map, nor is there any reference to such thing in the commissioners' report.
>
> "In order that the map or the report of the commissioners be of any service to the petitioners, it should show that the State Line, after crossing the river, followed Slick Rock Creek, if, indeed, it be Slick Rock Creek that is indicated on the map, to a junction with Little Fodder Stack. From the location of this stream marked 'creek' on the map, considered in the light of all the evi-

dence in the case, I am inclined to the opinion that it is Cheoah River, and not Slick Rock Creek" (R., p. 701).

When petitioners filed their bill of review they filed therewith affidavits of Surveyor Denton and M. E. Cozad (R., pp. 433436), which set forth how they had located, on the ground, the line shown on the map of 1821 and therein state that by the angles, distances and other data shown thereon they easily found the line went down the river and crossed to the mouth of Slick Rock Creek and after running up said creek one and one-quarter miles the line left the creek and followed up a ridge to Fodder Stack Ridge, thus including all of the lands of Slick Rock Basin instead of a portion thereof (as now claimed by petitioners). Later both Denton and Cozad testified that this same map absolutely determines that the line runs up Slick Rock Creek five and one-half miles and that they were in error as to the statements set out in their affidavits filed with the bill of review (R., pp. 533-539, 670).

In other words, petitioners thus demonstrated that the new evidence is *not* so clear, decisive and controlling in character, but that at different times for different reasons the same map shows two lines miles apart from each other. Which fact also shows the wisdom of the commissioners in limiting the calls in their report and shown on their map to the crest of the mountains as unchanging, ever present, natural monuments and on leaving said mountains to have only one course—due south.

Upon adopting the line the commissioners, contrary to the general custom, carefully excluded from their report and maps any reference to any field notes of courses and distances and call only for the natural monuments. By the report and the map the trees marked by the commissioners on the line adopted by them are located on the natural monuments called for.

PETITIONERS' CLAIMS AS TO THE MAP OF 1821.

The entire contention of petitioners is that the line run by their witnesses and surveyors, Messrs. Burns and Libby, from the point where the undisputed line northeast of the Tennessee River strikes the river, down the river one-half a mile, crossing the river to the mouth of Slick Rock Creek, thence up the creek five and one-half miles, thence up the Fodder Stack lead to Big Fodder Stack Peak, thence to the "Junction" near Stratton Bald Mountain, is similar in form and shape to the line shown by the map of 1821.

(Maps 386g and 386h inserted in Record, 755.)

Disregarding for the moment the elementary principle of law applied to the interpretation of boundary calls, to wit, that even courses and distances must yield to natural monuments called for, let us observe the testimony as to whether the platted line on the map of 1821 can, by its angles and distances, be located on the ground from the map itself.

Mr. Burns testifies:

"XQ. 20. Did you undertake to survey and locate the State Line as shown on the map of 1821?

"A. You mean by that question to show every little angle that they have shown?

"XQ. 21. Yes, sir.

"A. No, sir; I didn't try to do that.

"XQ. 22. Did you undertake to run that line at all?

"A. Which, the line of 1821?

"XQ. 23. Yes, sir.

"A. I undertook to—I took that map of 1821 and with my line it run the leading natural boundaries, that is the main ridges and the leading water courses that that map of 1821 was run on.

"XQ. 24. Please answer my question. Did you undertake to survey and locate the line as shown on the map of 1821, following the angles, mile marks, etc.?

"A. I didn't attempt to show all the little angles shown on the map of 1821; no, sir.

"XQ. 25. Did you undertake to locate and follow that line at all as shown by contour of the line itself, the circles, angles, etc.?

"A. I undertook to follow the ridges that conform the closest to that map of 1821 and the water courses. *I was governed by the marked trees that I found, along those ridges and water courses* . . . (R., p. 506).

"XQ. 27. You did not understand my question evidently. Did you take this map of 1821 and undertake to follow that particular line as located on that map, following the degrees and the angles, showing the mile marks exactly as it is shown on that map? Please answer that question, yes or no.

"A. You stated in your question, as I understand it, if I tried to run the courses and distances in the map of 1821. *You will notice in the map of* 1821 *there are no courses and distances, so all I could do to answer your question intelligently* as I can is to take the platting of the map of 1821 and test its accuracy by these test lines which I have shown. That is the only way I can answer your question.

"XQ. 28. At the left-hand end of said map of 1821 the points of the compass are given showing exactly north and south; the line as marked by the commissioners shows different deviations and angles from that direct north and south line. Did you take the map itself and the deviations as shown thereon and undertake to get the exact angles on each line and changes in the lines as shown by the map?

"A. No, sir; I didn't try to locate every little angle as is shown in there. You see the only resort——

"XQ. 29. Wait; no explanation. Can you take any part of that line on either side of the

river and point out to me where and how much of that particular line you undertook to survey showing the exact degree and the exact angles as shown on that map?

"A. Well, as I stated before, *there is no exact degrees or exact angles shown on the map, that is, there are no figures on it, and not having those figures, of course it would be impossible to try to scale off an exact distance which they measure on the ground on a scale that small, and therefore I couldn't attempt to try to show every little detailed angle* . . . (R., p. 507).

"Mr. Burns thus clearly admits that it was impossible, without field notes, to follow the map in locating the line, and that he did not even try to do so. He also clearly admits *that he was governed by the marked trees which were in evidence in the previous suit, and which therefore is not new evidence.*

"Mr. Libby, another of petitioners' surveyors, says:

"XQ. 18. To take the line as indicated on 'Exhibit A' to Mr. Burns' deposition it would be impossible for you or any other surveyor to take the distances and degrees as indicated on the map and correctly locate that line; would it not?

"A. It would be impossible for any civil engineer or surveyor to take that map and locate it according to the north point there and fit it on any ridge that is in that country today (R., p. 521).

"Mr. Hale, surveyor of respondents, testified as follows:

"Q. Where is the fifty-ninth mile tree with reference to the State Road Run, from Tennessee to North Carolina?

"A. It is two and one-half miles northeast of the State Road.

"Q. Then you tried to run a line in accordance with the degrees and angles as shown upon the newly discovered map from there to the Tennessee River; did you?

"A. Yes.

"Q. Were you able to follow the marked trees on top of the ridge from that point?

"A. No.

"Q. Please explain whether you were on one side or both sides of the top of the ridge, and if so, how far did you get from the top of the ridge where the State Line marks are at any point?

"A. In the first mile run southwest from the fifty-ninth mile tree, I got something like 300 yards on to the North Carolina side; in the second mile, I crossed on to the Tennessee side and got more than half a mile down off the mountain across streams and spurs, and ran down a stream a good ways. When I crossed the Pike Road I was, by the distance on the Pike Road, judging by walking it, at least a mile from the State Line, following the State Road. Then in the next mile I crossed into North Carolina a quarter of a mile from the State Line; then I crossed back into Tennessee and got from one-half to three-quarters of a mile from the State Line.

"Q. From your efforts and the work you did there, and your knowledge of the State Line, is it possible to take said newly discovered map and with it locate the State Line as indicated along the territory where it is undisputed?

"A. No, it is not. The map instead of being an aid to locating the State Line or finding the State Line is rather a hindrance.

"Q. Have you heard the testimony of D. B. Burns and C. Z. Denton taken yesterday and today in this suit?

"A. I have heard part of it; I didn't hear very much of Mr. Denton's.

"Q. Did you hear them tell where the undisputed State Line struck the Tennessee River?

"A. I did.

"Q. Half a mile above the mouth of Slick Rock Creek?

"A. Yes.

"Q. State whether or not there is where the marked trees in fact show that the State Line does strike the Tennessee River.

"A. It is.

"Q. Crossing the river and taking this newly discovered map as your guide, is it possible to locate the line up Slick Rock Creek?

"A. No.

"Q. Please explain why.

"A. Why, crossing the river at right angles as indicated by the map you would be half a mile east of Slick Rock Creek, and taking the bearings as near as can be ascertained from this map, and following them, and you will be crossing back and forth across the ridges and foot-hills and not be on Slick Rock Creek, and except in one or two places you won't approach Slick Rock Creek any less than a quarter of a mile.

"Q. This map shows that the commissioners crossed the river at or near the mouth of some stream. Please state whether it is possible from your previous experience in surveying, for that to be Slick Rock Creek.

"A. No. Following the track of the commissioners to the river, and then following the courses of the map, as indicated, you would be entirely east of Slick Rock Creek and half a mile east. While the creek on that is shown on the east side of the line instead of the line on the east side of the creek (R., p. 548-549).

Mr. Muller testified as follows:

"Q. Is it possible for you as a surveyor or for any other competent surveyor to take that line or tracing and locate the State Line as indicated upon that map?

"A. The map indicates that the State Line runs on top of the ridge from the shading, and it indicates that it crosses the river at right angles and I could not locate that line on top of a ridge in that country the way it is sketched here on this map.

"Q. North of the river the line shows the shading on the left-hand or southeast side. From your experience and knowledge as a surveyor, what did that shading indicate?

"A. It indicates that the line is on top of the ridge.

"Q. South of the river you find the same shading. What does that indicate also?

"A. It indicates the same thing.

"Q. If I understand you, then, if it was following the ridge on the north side of the river, the same shading would necessarily indicate that it was following a ridge on the south side; is that correct?

"A. Yes, sir.

"Q. Near the mouth of the stream marked 'creek' on the south side of the river, how does the marked line indicate the running with reference to said stream or creek?

"A. It indicates that it runs on the east side —the line runs on the east side of it—the line runs on the southwest side of the water course. And I see some shading on both sides of the line here, right close to the river.

"Q. What does that shading indicate?

"A. It indicates that between the shading is the top of a ridge.

"Q. State whether or not it indicates that the ridge is followed where the shading is shown.

"A. That is my opinion of it.

"Q. State whether or not there are any angles in that part of the line which shows running along the stream or creek, and tell what those angles are.

"A. It runs for about half a mile with no angle; it is a kind of a bend here, and then it turns to the right and runs perhaps forty rods, and then turns again to the left, running about the same distance, and then again to the right, running about eighty rods or perhaps one hundred and sixty, perhaps half a mile.

"Q. Are you thoroughly familiar with the topography of the country at and near the mouth of the Slick Rock Creek, and on both sides of the creek?

"A. I cannot say I am thoroughly familiar with it.

"Q. State whether or not you have been there with a view of examining the topography, and particularly as to the ridges.

"A. I have.

"Q. Is there any ridge at or near the mouth of Slick Rock Creek that would indicate this line as shown on this newly discovered map running the same course as indicated by that map?

"A. We tried to fit the courses and the map to the ridges there, but could not succeed. We could not find anything to fit it" (R., pp. 557-558).

COMPARISON OF BURNS' MAP WITH MAP OF 1821.

Comparing the line on the map made by Burns and Libby with the map of 1821, we note, first, from the undisputed point on the north bank of the Tennessee River the Burns line follows down the north bank of the river to a point opposite the mouth of Slick Rock Creek and crosses the river to the mouth of the creek. This location of the Burns line is absolutely controverted by the map of 1821 as from the undisputed point on the north bank of the Tennessee River the map of 1821 shows the line crossing the river direct (shortest route), at right angles to the stream. Second, the Burns line from the mouth of Slick Rock Creek follows the creek by its various courses, crossing the stream in its meanderings many times for a distance of five and one-half miles. This location is contrary to the map of 1821. The "creek" on the map is east of the line and the line only conforms in direction to the direction of the creek for about one-half a mile, when it sharply departs from the creek and returns in the direction of the stream, at the first mile. Thereafter the further course of the stream is away from the line and finally is several miles *east* of the boundary line located on the map.

Thus far Burns has run a line from the undisputed point in the north bank of the Tennessee River,

all of which is absolutely contradicted by the newly discovered map and report of commissioners and contrary to all the acts describing said line.

It is apparent that Burns was controlled *not by the new evidence,* but by the old evidence presented in the original case, to wit, the marked trees on Slick Rock Creek.

This is confirmed by Burns himself in his direct testimony.

> "Q. 33. Now what determined the location of this red line as shown on the map (Burns' map) that you made?
>
> "A. The red line is the transit line in which I ran.
>
> "Q. 34. I understand; what determines that line though; what do you find along there?
>
> "A. Why, marked trees were found in a great many places along this creek which determines or proves clear to my mind that that is where the line was run in 1821" (R., p. 484).

And again in cross-examination Burns said:

> "XQ. 25. Did you undertake to locate and follow that line at all, as shown by contour of the line itself, the circles, angles, etc.?
>
> "A. I undertook to follow the ridges that conform the closest to that map of 1821 and the water courses. *I was governed by the marked trees that I found along those ridges and water courses*" (R., p. 506).

The line run by Burns on leaving Slick Rock Creek, after following the same for five and a half miles, goes westward up Big Stack lead to Big Fodder Stack and then *southeastwardly* to the Junction. Great stress is laid by Burns and petitioners on the fact that the angle of his line at Big Fodder Stack Peak has its vertex to the west and in this conforms to a similar angle on the map of 1821 at "about" the same distance south of the Tennessee River. This angle with its vertex to the west on Burns' map is, by his route,

about eight or nine miles from the undisputed point on the north bank of the Tennessee River.

Referring to the Hale map of the disputed territory (R., p. 754) it will be observed that the course of the line over Hangover Ridge is generally parallel to the course of Slick Rock Creek for several miles and that at the "Junction," *which is about nine miles from the undisputed point on the north bank,* the angle of the State Line has its vertex to the west.

Burns, for the purpose of comparison, letters his line (map 386h, R., p. 754) at the mouth of Slick Rock Creek *B;* Big Fodder Stack Peak is lettered *C*, and the "Junction," the undisputed point to the south, is lettered *D*. Burns then draws lines *B C* and *C D*. Then taking the newly discovered map, Burns letters the mouth of the "creek" at the Tennessee River *B* and a pronounced angle, with vertex to the west, south of the Tennessee River, he letters it *C*, and the next pronounced angle, or break in the general direction, on the map of 1821, he letters *D*, and on said map draws lines *B C* and *C D*. It will be observed that all Burns' comparison and deductions therefrom amount to is that the general trend of his line is similar to the general trend of the line on the newly discovered map of 1821.

General trend is not location, similarity is not identity.

Note also that the scale of the newly discovered map is 13,200 feet to the inch, and the scale of Burns' map is 1000 feet to the inch, *so that any variation of the state map compared to Burns' map would be apparently less than one-thirteenth of what that variation really is.*

Further it will be noted that by placing Point B on Burns' map at Slick Rock Creek, and assuming it to be the same point as that represented by Point B (as placed by Burns) on the newly discovered map, Burns has made a departure of half a mile from the

newly discovered map in order to uphold his contention as to the location of the State Line, *when the distance between the disputed lines at this point, the south bank of the Tennessee River, is only one-half mile, which one-half mile Burns thus allows himself by assumption.*

Also Point C on Burns' map is only one and one-half miles west from Slick Rock Creek, whereas Point C on the newly discovered map is nearly four miles west from the "creek," a difference of two and one-half miles.

Hence Burns, to make his comparison of the *general trend* of the lines of the respective maps, as to Point C on his map departs from the newly discovered map three miles, to wit: Half a mile down the Tennessee River, and Point C on the newly discovered map being practically four miles from the "creek," and on Burns' map only one and one-half miles from Slick Rock Creek, gives an additional departure of two miles and a half. The distance between the disputed lines at this point (opposite Big Fodder Stack) *is but three miles.* In other words, Burns to place the line over Big Fodder Stack, where he contends it should be, has been driven to the necessity of showing a discrepancy between his map and the newly discovered map of three miles, when the distance between the disputed lines at Big Fodder Stack is *only three miles.*

The "Creek" on the Map of 1821 East of the Line Where it Crosses the Tennessee River is the Cheoah River.

Referring to Hale's map of the disputed territory (R., p. 754), Slick Rock Creek is clearly shown to be enclosed within the basin formed by the Hangover Ridge on the east and south and the Fodder Stack Ridges on the west. The "Junction" is shown directly south of the head of the Slick Rock Creek. It is clearly

apparent that no one could follow the Burns route up Slick Rock Creek, and via Big Fodder Stack Peak to the "Junction," as petitioners contend the commissioners of 1821 did, and not see that Slick Rock Creek heads directly below the "Junction," *a point in the undisputed State Line.*

The "creek" on the map of 1821 is *not* shown as having its source or head at or near a point in the State Line, as shown on said map, but is shown thereon as having its source or head miles east of the State Line and far within North Carolina, which fact conforms only to Cheoah River.

Neither could anyone follow the "Burns line" and not know that at the "Junction" that the highest and most prominent ridge (to the top of which they would have to climb from where the Fodder Stack Ridge joins it), enclosed Slick Rock Creek on the east. According to the Burns theory the commissioners were running their line to reach this same ridge, and yet Burns asks the court to credit that the commissioners not only did not sketch this ridge joining the Fodder Stack Ridge at the "Junction," but placed the "creek" running across the territory where said ridge is located. But to the east of that said ridge, which according to the Burns contention, the commissioners do not show on their map, does lie the Cheoah River. The said ridge is the main Hangover Ridge.

Under these facts, it cannot be reasonably assumed that the commissioners would adopt a map, intending to show they followed the meanders of said creek five or more miles, and then sketch said creek with its course shown *miles east of any point in the State Line.* But it is reasonable to believe and is evident that the "creek" on said map of 1821 was intended to represent the Cheoah River, which drains the eastern slopes of the main ridge, which ridge includes the Hangover Peak, the "Junction" and which is followed by the undisputed State Line, south of the "Junction."

Further, the course of the "creek" on the map of 1821, with reference to both the course of the Tennessee River and the compass, is similar to the course of Cheoah River and not the Slick Rock Creek. The right angle turn to the eastward of said "creek" near the mouth on the map of 1821 corresponds to the right angle turn which the Cheoah River makes near its mouth. (See Exhibit A, map of J. L. Williams, Rec., p. 858.)

But it is urged that the Report of the Commissioners calls for crossing the Tennessee River at the distance of 65 miles and that the line claimed by respondent would strike the south bank of the river within 65 miles or about 64½ miles. That the map of 1821 further shows a mile circle where the line strikes the south bank and that these facts indicate the "creek" is Slick Rock Creek. It will be noted that all natural monuments and trails called for in the commissioners' report, from its beginning and down to the Highawassee River, as crossed by the line at certain distances are made in even and not fractional miles,—Porters Gap, 22 miles—Equonettly path at 53 miles,—Tennessee River at 65 miles—old trading path leading from the valley towns to the overhill towns, at 93 miles—Unaka Turnpike at 101 miles.

Further, it is admitted that the width of Tennessee River, on the map of 1821, where the line crosses the same, is represented as being several times its actual width, so that it is apparent that if the Tennessee River were sketched in according to its true width the mile circle, now claimed to be shown on the south bank of the Tennessee River, would be shown considerably south of the said river.

The contention of petitioners that this map supports the line claimed by them, and at the same time denying many facts that the map and commissioners' report call for as to natural monuments, claiming that

the same are errors, is in effect asking the court to accept the new evidence as corrected by petitioners; *their addenda*, as a basis of their bill of review.

Immediately east of the Hangover Ridge is the larger drainage basin of the Cheoah River. The mouth and gorge of the Cheoah River, lying eastward from the line they were running, would be very noticeable to the commissioners as they came down the ridges north of and approaching the Tennessee River (R., pp. 602-604). Also, the commissioners' party would clearly see, as they approached the north bank of the Tennessee River, the high bluff which runs down the south side of the Tennessee River from the mouth of the Cheoah River almost to the mouth of Slick Rock Creek *appearing as the base of the great Hangover upheaval* (R., p. 586). It should be remembered that the commissioners when they first saw the Tennessee River, as they approached it from the north, had run the line through a wild country over extreme elevations of the highest ridge of the Smoky Mountains for a distance of sixty miles or more, and the sight of the great gorge and valley of the Tennessee River was the most notable view and monument of their entire course. It was the first and greatest stream they had to cross. They would carefully observe the valley and gorge of the Tennessee River and the high ridges south of the river. Their course on the north shows they were careful to follow the highest ridges. How their line, as adopted by them, approached the Tennessee River and how said line crossed and departed from the river would certainly be facts clearly fixed in their minds. After getting on the south side of the river the surveyors and commissioners would also see the head waters of some of the tributaries of the Cheoah River to the eastward of their line. It cannot be reasonably contended that the commissioners ran the line down the Tennessee River, thence crossing to Slick Rock

Creek and thence up Slick Rock five and one-half miles, and then marked their map, and made the calls in their report, for crossing the Tennessee River direct and departing from the river on the crest of mountains.

Mr. Muller, referring to the "Creek" on the map of 1821, testified that they have pictured the Cheoah River for the creek, but have got it further down stream than it actually is (R., p. 585). Also, that, following Burns' course, going to the river, crossing the river, then up the creek is not possible, as it makes a gap that is not accounted for (R., p. 561). He further testifies *that the indications are that the line takes the crest of the mountain immediately after leaving the river* (R., p. 561). He says, on his cross-examination, that the bluffs extend from the mouth of the Cheoah all the way down to the mouth of Slick Rock Creek; that is, the Hangover Ridge bluffs (R., p. 586).

And further testified on the cross-examination as follows:

> "Q. Now, standing at that point, about six thousand feet back there, could you see the Cheoah River from there?
>
> "A. I do not remember whether we could see the Cheoah River or not.
>
> "Q. Could you see the gorge out of which it came?
>
> "A. Yes, sir."

On the direct examination, Mr. Hale says that *the stream or creek marked on the map is the Cheoah River* (R., pp. 549, 550, 601).

And on his cross-examination, *that the line runs on the crest of the mountain and not up a stream.* There are streams marked on the map, but the map shows that the line followed a ridge. He also says, on his cross-examination, *that when they reached the Tennessee River, they went directly across* it (R., p. 599). Again, that there is no other way of locating the line, other than over the Hangover, and that the commis-

sion did locate the line on the Hangover. Again, he says, approaching the river you see two streams. The stream sketched on the map is on the left of the line, but too close to the line. Also, *that the Hangover line is more consistent with the line on the map, when taken in connection with the report of the commissioners, than the Slick Rock Creek line* (R., p. 603). Also, *that as you stand a mile north of the river, looking towards the river, you see Cheoah River on the left and Slick Rock Creek on the right; that Slick Rock Creek actually runs northeast, and the Cheoah River northwest, each several miles* (R., pp. 602-603). The Cheoah River turns north as it approaches the river (R., p. 604).

Witnesses Muller and Hale were surveyors for respondent.

W. P. Chambers, a witness called for petitioners, contending that the said "creek" is Slick Rock Creek, testifies *that the "creek" is not laid down correctly on the map* (R., p. 619).

Mr. Ed. Mayfield, a witness called for petitioners, says *that Slick Rock Creek is not plotted on the map to run as Slick Rock Creek does run* (R., p. 622).

Mr. Libby, a witness for petitioners, says, that the creeks and rivers are probably sketched in, inasmuch as they show the Tennessee River to be about one-half a mile wide, when, as a matter of fact, it is only about 300 feet wide and he says *they were probably sketched in after the ground was platted* (R., p. 522).

Mr. Denton, surveyor for petitioners, says, *that the creek marked on the map cannot possibly be Slick Rock Creek, if it is correctly marked on the map* (R., p. 539).

Mr. Burns, surveyor for petitioners, says that they sketched in the "creek" on the map of 1821, and sketched it too low down (R., p. 631). Mr. Burns says that the main thing is to show by this map the right ridges and water courses (R., p. 630), yet he followed

the Slick Rock Creek five or five and a half miles up a valley, and not up a ridge, to get onto the ridge, and the only ridge, which would bear out their location of the line. Although he says the main thing is to show by this map the right ridges and water courses, he testifies that the water course marked "creek" is three miles east of where it ought to be.

Granted that the State Line from the admitted State Line fore and aft tree on the north bank of the Tennessee crosses direct to the south bank and thence to Hangover peak, and the "Junction," then the "creek" on the map of 1821 demands no abnormal or unusual explanation. The "creek" on the map of 1821 drains the waters east of the State Line shown on the map and according to the contention of respondent, this answers the description of the Cheoah River. The fact that the "creek" at its mouth is sketched in a little too close to the State Line is not misleading nor surprising, as a sketch, since the "creek," considered as representing Cheoah River, is no part of the line. But if it were *part of the line* it necessarily would be actually located by running that line. This contention of respondent that the "creek" is Cheoah River calls for no interlineation to be suggested for the definite and plain calls of the Cession Act, the report of the commissioners and the confirmatory acts of the respective states. The theory of the line up Slick Rock Creek and that the "creek" on said map is Slick Rock Creek, demands that words or changes be added to all of the authoritative documentary evidence in this case, describing the location of the State Line and forces the theorizer into the domain of speculative surmises.

Burns himself says that one of the leads to the Hangover is right at the Tennessee River on the south side (R., p. 508). They were following the Smoky or Stone Mountain Range; they crossed the river, the call then is *thence to the main ridge*, and along *the extreme height thereof*. The call does not say what course to

take when going from the river to the main ridge. We must remember that courses are not given until the mountains cease, and then they are given. Yet Mr. Burns runs up Slick Rock Valley five miles, for the purpose of getting onto a ridge, because the call is for a ridge; but he gets onto the Fodder Stack instead of the Hangover simply because the theory of appellants takes them to the Fodder Stack instead of the Hangover; and yet in order to comply with the call in the Cession Act and in the report of the commissioners, they do not get onto a ridge after going five miles up the creek. If the creek ran on the crest of a mountain that would do, but it does not. It is down in the Slick Rock Basin between the Hangover and Fodder Stack Ranges. We get onto the highest range of the Smoky Mountain chain immediately after crossing the river, thereby complying with the call in the Cession Act and the report of the commission, which says, after crossing the river "*thence to the main ridge.*" We follow *along the extreme height thereof*, while Burns, in order to get on the Fodder Stack has to go five miles up the valley.

Mr. Muller, on his examination in chief, says that the most prominent ridge you see from the north of the river is the Hangover Ridge (R., pp. 560-561).

Mr. W. P. Chambers, a witness called for appellants, says *that standing a mile or a mile and a half on the line north of the river, and looking south, the first thing you would see would be the Hangover* (R., p. 607). It is the most prominent ridge from that point. He also says that the Hangover is four or five hundred feet higher than the Fodder Stack (R., p. 608). This fact is admitted by all the witnesses.

Opposite to the undisputed "spruce pine" on the north bank of the Tennessee River stands the high bluff of the Hangover Ridge; to the east is the Cheoah River, which river drains the eastern slope of the

Hangover Ridge, the eastern slope of the "Junction" and several miles of the State Line south of the "Junction." Why seek to deny the map of the commissioners and their report; the Cession Act; the confirmatory acts which conform to this stream being the Cheoah River, and contradict its being Slick Rock Creek? According to Hale's map and Burns' map, the Slick Rock Creek runs at right angles or nearly so to the course of the Tennessee River at that point. It will be observed that the course of the "creek," referred to on the map of 1821, approaches the course of the Tennessee River at that point, which course corresponds closely to the course of the Cheoah River as it flows to the Tennessee River. Further, the Cheoah River drains a much wider area than the Slick Rock Creek, and is a much more notable stream. If the "creek" on the map of 1821 is not to represent Cheoah River, then the Cheoah River is not shown on the map, although the map shows some care in indicating the more *prominent* streams down the entire length of the line.

Slick Rock Creek, draining only about 10,000 acres or about fifteen square miles, is comparatively an unimportant stream. Further, the Cheoah River does flow a number of miles east of the "Junction" and does rise southeast of the "Junction." Also, the map of 1821 shows a mountain range east of the upper half of the stream marked "creek," which mountain range apparently represents a watershed of the creek, which, though roughly sketched, is clearly far east of the boundary line, which also conforms generally to the Cheoah River watershed, and certainly not to that of the Slick Rock Creek.

Also, on the map of 1821 on the north bank of the Tennessee River, the first stream shown flowing into the Tennessee River is about six miles eastward (North Carolina side) from the boundary line and opposite

the mouth of said stream south of the Tennessee River, the "creek" under discussion on said map extends eastward into North Carolina many miles beyond a point immediately opposite the mouth of said stream shown on the north side of the Tennessee River. In other words, the "creek" on the map of 1821 is shown to have its source within the State of North Carolina, twelve or fifteen miles east of the State Line, which fact alone, by its course and drainage basin, conforms only to its representing the Cheoah River.

The only possible, as well as reasonable, interpretation of the "creek" on the map of 1821, under discussion, which will harmonize with the description of the commissioners' map and report, the various acts describing the line; all of which call for crossing the Tennessee River direct on reaching the river and departing from the river following the crest of a mountain ridge, is that the "creek" on the map of 1821 is intended to represent the Cheoah River; which river and its junction with the Tennessee River, the commissioners could not fail to see, lying to the east of the line they ran as they approached the Tennessee River, and they must have recognized that the "creek" drained the eastern slope of the Hangover Ridge, on a continuation of which ridge is located the undisputed State Line south of the "Junction."

WEIGHT OF THE EXPERT TESTIMONY.

When complainants filed their petition for leave to file this bill of review they filed therewith an affidavit made by Mr. C. Z. Denton as to his having gone on the ground with the newly discovered map and by its aid located the State Line. Mr. Denton's testimony admits this affidavit to be incorrect and that he permitted statements to be inserted in his affidavit which he was not willing to stand by (R., pp. 533-534-535). Therefore, it would not appear that his testimony con-

firming Messrs. Burns' and Libby's testimony is of any weight in the matter.

While we do not raise the question of the integrity of any of the witnesses, it is material to consider the competency and experience of these men, as shown in their testimony, in order to appreciate the value of their testimony.

Mr. Burns, witness for the petitioners, testified that he had done ordinary land surveying for several years, that he had been draftsman in an office for about a year and had been connected with railroad engineering, but had never done any work locating State Lines and was not familiar with this particular territory where the disputed land lies (R., pp. 478-479).

Mr. Libby, witness for the petitioners, testified in effect that he had had considerable less experience than Mr. Burns (R., p. 518).

Mr. Hale and Mr. Muller, witnesses for respondents, each testified they had had many years of surveying in the particular territory where the lands lie, and had surveyed many times portions of the State Line between North Carolina and Tennessee, and that they are familiar with the marks used on the trees in the locality concerned, and possess a thorough knowledge of the ridges and streams, as a result of life-long experience in pursuing their profession in this class of work in the locality (R., pp. 546, 547, 555).

It is not necessary to discuss the qualifications of Messrs. Chambers and Mayfield, witnesses for petitioners, as their testimony consists of general "opinions," intended to be favorable to petitioners' theory as to the location of the State Line, with no expert data stated by them as a basis for their "opinions." Mr. Chambers described the general topography of the territory in dispute. Mr. Mayfield gave his opinion as to how he would have run the line had he been a commissioner.

SUMMARY.

1. The map of 1821 shows:

(a) That the line adopted by the commissioners from the beginning to the Tennessee River was located on mountains.

(b) That the line crosses the Tennessee River direct (shortest route) from where it strikes the north bank of the said river.

(c) That the line as it departs from the south banks of the Tennessee, is located on mountains and continues on said mountains, beyond any point here in dispute.

(d) That eastward of the line, where it strikes the south bank of the Tennessee River, is a "creek"; the course of which, to its source, departs further and further from the State Line, which stream as shown would drain the eastern slope of the mountains on which the map shows the State Line located at that place.

2. The undisputed "spruce pine" State Line tree on the north bank of the Tennessee River is opposite the Hangover Ridge, and so marked as a fore and aft tree as to show that the line crosses the river direct at that point.

3. A line run from the said marked "spruce pine" and crossing the Tennessee River direct (shortest route) locates the line on Hangover Ridge.

4. The Hangover Ridge is marked with State Line trees.

5. The Hangover Ridge is the "main ridge."

6. Immediately to the eastward of the Hangover Ridge, draining the eastern slope of said ridge, lies the basin of the Cheoah River, the mouth of which stream

is plainly visible from the undisputed line north of the Tennessee River, as you approach the river from the north.

7. The Cession Act of North Carolina of 1789 granting the territory now Tennessee, describes the line as follows:

> "Thence along the *extreme height* of said (Great Iron or Smoky) Mountain to the place where it is called Unicoy or Unaka Mountain,"

which description conforms only to the line located over Hangover Ridge from the undisputed spruce pine tree on the north bank of the Tennessee River.

8. The report of the commissioners of 1821 and the confirmatory acts of the States of North Carolina and Tennessee described the line under discussion as follows:

> "Thence in a southwestwardly course to the Bald Rock on the summit of the Great Iron or Smoky Mountain and continuing southwestwardly on the *extreme height* thereof to where it strikes Tennessee River—crossing the Tennessee River—from Tennessee River *to the main ridge* and along the *extreme height* of the same to the place where it is called the Unicoy or Unaka Mountains,"

which calls conform only to the location of the line over the Hangover Ridge from the undisputed "spruce pine" on the north bank of the Tennessee.

No contentions of petitioners can avail to write into the report of commissioners and the confirmatory acts of the States of North Carolina and Tennessee, or the Cession Act of 1789 "down the Tennessee River one-half mile to the mouth of a creek, thence up said creek five and one-half miles, etc., nor can any contentions of petitioners change the facts on the map and trace the line down the Tennessee River one-half a

mile and replace its location on mountains with a line running five and one-half miles up a creek. If creeks flowed along the crest of mountains instead of the lowest elevations of valleys petitioners' argument would have virtue.

I.

By the General Principles of Equity, Parties Not Aggrieved by a Decree Cannot Claim the Reversal of the Decree Upon a Bill of Review.

Mr. Justice Story said, in delivering an opinion in *Whiting v. Bank of U. S.*, 13 Peters, 6:

> "No party can, by the general principles of equity claim a reversal of a decree upon a bill of review, unless he has been aggrieved by it, whatever may have been his right to insist on the error at the original hearing or on the appeal."

It is said by the court in *Keith v. Alger*, 124 Fed. 35:

> "Moreover, the court, in inquiring whether the party has been aggrieved, will look to the consequences which have ensued or are likely to ensue in consequence of the fault complained of. In other words, the court takes into view all the circumstances of the situation, for a bill of review is a dernier ressort, devised to relieve a party who has suffered a substantial wrong from the miscarriage of justice in the former proceedings. And the inquiry deals with the state of things existing at the time of filing the bill of review. That facts which might have availed to prevent the decree, or to reverse it upon appeal, will not suffice to enable a party to maintain a bill of review, unless such facts defeat a substantial equity, is a doctrine well established."

Other authorities on the same principle are:

Thomas v. Harvie's Heirs, 10 Wheaton, 146, and *Brown v. White*, 16 Fed. 900.

The rule of the law laid down, as to who may be a party to a bill of review, is that none but parties to the original suit or their privies can have a bill of review, *and that it does not lie for assignees* (that is, parties without *any* interest).

In *Thompson v. Maxwell*, 95 U. S. 391, an assignee of the defendant in the original suit filed a bill of review. The original suit involved the title to land both of which facts are true in this case now before this court. The court held:

> "The bill is filed by and on behalf of an assignee of the original defendant; whilst another rule, relating to bills of review, is that none but parties and privies can have a bill of review. It does not lie for assignees."

Also:

Bank of U. S. v. White, 8 Peters, 262;
Perkins v. Hendyx, 127 Fed. Rep. 448;
Shaw v. Little Rock Co., 100 U. S. 605;
Fitzgerald v. Cummings, 1st Lea. 232.

Petitioners have labored to quote authorities at length on the point that, even though they are assignees, if they are aggrieved by the final decree, they are proper parties to file a bill of review. The fact is, petitioners are not, and never were, aggrieved by the final decree in Belding v. Hebard.

The petitioners for the bill of review were Hopkins, et al. (R., p. 421), who claimed under Belding, et al., and the deed purporting to convey said lands to Hopkins, et al., was executed and delivered to them (at least), nearly three years after the final decree in the original case, Belding v. Hebard (R., pp. 445-449), which decree set forth that the Belding title to the lands in dispute was void, and that the title of Hebard, under whom respondents claim, to said lands, was valid (R., pp. 371-415).

The depositions taken at Cincinnati on June 19, 1909, show the history of the title of the Belding lands as now vested in Hopkins, et al., to be:

1. That Belding, et al., by certain articles of agreement, dated December 9, 1899, made a certain conveyance to Robert N. Archer and Thomas F. McGarry, as trustees, which agreement of trusteeship was for the purpose of paying certain debts and liens on the lands and to purchase certain outstanding title in said lands, and the necessary monies were to be secured by selling the timber or operating, as it would be advisable and necessary in order to pay said debts, &c. The trustees, upon said debts being paid, &c., were to reconvey the land of Belding, et al. The term of the trusteeship was for five years, and it was also provided that in case of default in the payments, the trustees should have the power to sell the lands and timber thereon (R., p. 678-683).

Note that appellants were not a party to this agreement.

2. M. E. Cozad testified that in the spring of 1900 he met at a hotel in North Carolina one J. C. Creith, who claimed to be an agent for said Archer and McGarry, trustees for the sale of the Belding lands, and that he brought the matter to the attention of Hopkins, et al., and that a contract in writing was entered into October, 1900 (R., pp. 664-666). William R. Hopkins testifies to the same effect (R., p. 674).

It will be noted that this was not even a contract to purchase, that Mr. Creith was an authorized agent *was not even shown*, and further, it was a verbal understanding at most, merely that they might have the opportunity of entering into a contract to purchase these lands later should they desire to do so. Under any statement of these facts whatever, there was no contract cognizable at law or in equity. Hopkins, et al., will surely not deny that they purchased these lands since the statute of frauds became law.

3. On October 29, 1900, Robert N. Archer and Thomas F. McGarry, as trustees, gave an option to Hopkins, et al., to purchase certain lands in Graham County, North Carolina, and this option included certain terms of sale, but was *conditioned* that Hopkins, et al., *need not purchase said lands unless the lands offered contained an acreage of* 38,000 *acres* and not less than 140,000,000 feet of timber of merchantable character, not estimating hemlock, and *conditioned also that the said acreage* and timber *could be conveyed by good title unincumbered;* and also conditioned that *in no event would Hopkins, et al., be compelled to purchase said lands,* but that $7500 should be liquidated damages for the breach of the contract (R., pp. 676-678).

Therefore it is apparent that the above, the first agreement between Hopkins, et al., and their vendors, was an option to purchase not an absolute contract to purchase. By clause 3 it is expressly provided "that in no event would Hopkins, et al., be compelled to purchase said lands," and then it is provided, if they do not, what in effect is that they shall pay $7500 for having had the option.

Further, it will be noticed, as vital to the equities in this case, that said agreement of October 29, 1900, was made several months after the final decree in the case Belding v. Hebard, which was entered July 13, 1900.

4. The deed, Robert N. Archer and Thomas F. McGarry, trustees, to Hopkins, et al., under which Hopkins claims the lands now in dispute, was dated *March 3, 1903,* but the deed in fact, as the acknowledgments show, was not executed until *June 5, 1903, and when it was delivered to Hopkins, et al., does not appear,* but it was not recorded until some time in 1904 (R., pp. 689-694).

This deed describes the land which it purports to convey as 65,000 acres in Graham County, North Caro-

lina, and after describing said lands by grant numbers, entries and acreage, adds the significant words, to wit:

> "Subject, nevertheless, to all deductions, if any arising, by, through, or under the 'State Line' suit hereinafter mentioned, grants No. 8100 for 16,800 acres and No. 2336 for 14,800 acres above mentioned being for the same lands" (R., p. 691).

and further in the warranty of said deed we quote:

> "But there is especially excepted from the covenants of this conveyance all those lands situated at or near the State Line between the State of North Carolina and Tennessee, *which were recovered* in a certain action known as the State Line suit, which was pending in the United States Circuit Court for the Eastern District of Tennessee, and was brought by one Hebard against David W. Belding, and others, if future proceedings do not recover the title thereof" (R., pp. 693-694).

The evidence offered by petitioners themselves thus conclusively demonstrates that at the time that the final decree in the original suit, Belding v. Hebard, was entered, petitioners had no interest whatever in said lands, and that they were, therefore, at that time in no wise affected by said decree. They did not enter into any contract to purchase said lands until October 29, 1900, which contract was not an absolute agreement to purchase said lands, whereas the final decree was entered July 13, 1900. Further, it appears from their own evidence that they did not secure title to said lands until some time after June 4, 1903.

It will also be noted within the deed itself *there is described as conveyed about* 65,000 *acres of land*, and that said described lands are *subject to the deductions arising over the State Line suit*, and further *excepts* from the warranty clause the *lands situated at or near the State Line recovered by Hebard* in the suit

brought by him against Belding and others. When we note, with this clause of conveyance of 65,000 acres, that the option or contract of October 29, 1900, of said trustees to Hopkins, et al., sets forth that there *is to be at least* 38,000 *acres of lands*, conditioned upon being good and unincumbered title, it becomes apparent that Hopkins, et al., did not regard said deed as a conveyance of the land in dispute, but at most merely endeavored by it to secure to themselves whatever possible or unknown rights Belding might have in and to the lands recovered by Hebard in the State Line suit.

It is pertinent to state to this court that a certified copy of this deed, Archer and McGeary, trustees, to Hopkins, et al., was first filed by the Smoky Mountain Company in its answer to the original petition for bill of review, filed by complainants in this case, and therefore not originally filed by Hopkins, et al.

The testimony of petitioners thus conclusively shows that at the time the final decree was entered in the original case of *Belding v. Hebard*, Hopkins, et al., had no interest whatsoever in said lands, and they had *actual notice that the title to said lands was vested in Charles Hebard* and the title they claim under was declared void. Petitioners were in a position, therefore (not technically, but actually), to protect themselves, and that they did so do is shown from the recitals of the deed itself. If they claim to have given consideration for the lands now in dispute (which they never have claimed), they certainly were not innocent purchasers. Upon the recitals set out in their deeds, appellants have no place in equity or in law to complain now to this court.

Under the authorities cited and argument stated above, it is clear beyond any doubt whatsoever, that Hopkins, et al., cannot now prevail upon a bill of review to reverse a decree by which they were never aggrieved. To show themselves proper parties, under

the facts, to prevail upon the bill of review filed, Hopkins, et al., are driven to the necessity of showing authority to the effect that a decree may be reversed by a party not aggrieved by said decree. Such authority they have not shown and are unable to find, as it is antagonistic to all legal precedent and justice. The equities of the dispute lies not with them and their contention.

The Circuit Court of Appeals in its opinion rendered by Judge Knappen, when this case was heard upon bill of review, *inter alia*, said:

> "What we do mean to decide is that, in our opinion, taking into account not only the speculative purchase by appellants, but also the good-faith purchase by the Smoky Mountain Company, a case is not presented which appeals to the equitable discretion of the court to allow the review of a decree upon the ground alone of newly discovered evidence. We rest our decision solely upon this proposition. Bearing in mind the rule that this bill of review for newly discovered evidence is not of right, no matter how persuasive of error in the original decree the new evidence may be, and that it should not be allowed if such allowance would result in mischief to innocent parties, and having in view the stability necessary to be afforded to decrees, especially of courts of last resort, where disturbance thereof is not essential to the protection of the real equities of the parties before the court, we think the review asked for should be denied. In our opinion, the stability of judgments, and thus the protection of rights acquired in reliance upon them, are such as, under the peculiar circumstances of this case, to make the review asked for inequitable. Nor do we think the situation is changed by the fact of the conveyance by Belding and his associates to the trustees pending the suit, nor by the fact that appellants were negotiating for, and possibly may be said to have had, to some extent, an option for the purchase of the land previous to the final decree. The

appellants were not bound to make the purchase until contract therefor was actually made, which was after the decree sought to be reviewed when entered; and the purchase then made, as has been said, was speculative as to the land here involved" (R., p. 844).

It is not open to question that *the said decree of the United States Circuit Court of Appeals at Cincinnati, Ohio, entered in the original case July* 13, 1900, *was a final decree,* but we refer nevertheless to the case of *Hugh Stevenson v. William Fain, et al.,* 195 U. S. 166, which was a suit of exactly like character, and decided in the United States Circuit Court of Appeals at Cincinnati. The complainants in that suit having lost, sought to carry it to the Supreme Court of the United States. The suit was dismissed in the Supreme Court on the ground that there was no right of appeal. See also U. S. Judiciary Act, 1891.

II.

A Bill of Review Will Not Affect the Title of a Bona-fide Purchaser (of the Property in Controversy) From the Successful Party, After a Final Decree and Without Notice That a Bill of Review Is to Be Filed.

In the case of *Lee County v. Rogers,* 7 Wall. 181, certain bonds were issued by Lee County, and in a case to determine their validity, the highest court of the State of Iowa decided that the county possessed the power to issue the bonds, for the purpose for which they were issued, and that the same were therefore valid. After this decision the bonds were sold. After the sale of said bonds, on another action, the same court reversed the previous decision. It was contended that Lee County was therefore not liable to pay said bonds, and the matter was brought for review to

the Supreme Court of the United States, and it was held that the bonds being in the hands of bona fide purchasers, were valid and binding upon the county issuing them. This principle is supported by this court in a decision in *Whiting v. Bank of U. S.*, 13 Peters 9.

In *Rector v. Fitzgerald*, 59 Fed. Rep. 808, the Circuit Court of Appeals held, that where a final decree dismissed a suit filed by Rector, which dismissal was in 1881, and in 1884 Fitzgerald took a mortgage on the land involved from the grantee of the defendant who had prevailed in the suit, and afterwards Rector filed a bill of review against Fitzgerald and his grantor to reverse the decree, that Fitzgerald was a purchaser of the mortgage in good faith, after the term at which a final decree in favor of his grantor had been rendered, and his title could not be affected by a decree subsequently rendered on a bill of review subsequently filed. The court said:

> "We are of the opinion, both on principle and authority, that a bill of review ought not to be regarded as a continuation of the original suit, merely for the purpose of affecting a purchaser in good faith, after a final decree with notice. In our judgment, one who thus purchases after the lapse of the term at which a final decree on the merit is rendered, without notice that a bill of review is in contemplation, or will be exhibited, should be protected from the effect of a decree, if it is subsequently filed."

The case of *Ohio River R. Co. v. Fisher*, 115 Fed. Rep. 929, presented the same questions of law as the above cited case of *Rector v. Fitzgerald*. The court, in its opinion *upholding the title of the bona fide purchaser*, said:

> "This decree, filed January 21, 1885, invested H. J. Fisher, Jr., with all the evidence of an absolute title. Then these appellants purchased, paid their money, entered into and remained in posses-

sion of the realty thus acquired. 'No equity can be stronger than that of a purchaser who has put himself in peril by purchasing for valuable consideration without notice of any defect in the title. *Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 388.' How are they affected, as respects the rights of Mrs. Maria P. Fisher, by bill of review filed in 1890, several years after their purchase? In *Rector v. Fitzgerald*, 59 Fed. Rep. 808, we find this: 'A bill of complaint had been filed by R., and a final decree had been entered May 2, 1881, dismissing the bill. R. appealed from the decree, but failed to prosecute the appeal, and it was dismissed December 6, 1881. On February 29, 1884, one F., took a mortgage on lands, the subject matter of the litigation, from one who had purchased from successful party. On April 29th thereafter R. filed his bill of review, to which he made F., the mortgagee, and the mortgagor parties. He sought to reverse the former decree for error appearing on the record. F. pleaded his equity as a *bona fide* purchaser without notice. After a full and elaborate discussion, the court held that the purchaser without notice bona fide, after a final decree in favor of the grantor, had a title which could not be affected by a decree rendered on a bill of review subsequently filed; that a bill of review will not be regarded as a continuation of the original suit, so as to affect a person purchasing the property in controversy in good faith from the successful party after a final decree and without notice of any intention to file a bill of review. This case cites Ludlow's *Heirs v. Kidd's Ex'rs*, 3 Ohio 541. Certain infants filed a bill to obtain the legal title to certain lands. The bill was dismissed on final hearing. The defendants, who were in possession of the land and had an apparent legal title, sold the same to third persons, strangers to the suit. A statute of Ohio allowed infants five years after attaining majority to bring a bill of review in cases of this character. The complainants availed themselves of this statutory right after becoming of full age, and prayed a reversal of

the original decree. It was held, after a careful scrutiny of the authorities, that the intermediate purchasers were not affected by the decree of reversal. This case also quotes *Lee Co. v. Rodgers*, 7 Wall. 181, 19 L. Ed. 160, in which it is held that a purchaser *bona fide* of bonds, after a final decree declaring them valid, and before a decree on bill of review declaring them invalid, was not affected by the latter decree, because they were distinct and independent suits. This doctrine seems also to have been recognized in *Bank v. Ritchie*, 8 Pet. 146, 8 L. Ed. 890. On a bill of review Chief Justice Marshall set aside sales made under the authority of a decree which he reverses. He, however, gives it as a reason for this that the title acquired by the purchasers was defective in itself, inasmuch as the executor, who made the sale, had not complied with the terms of the decree under which he claimed to act, and because it also appeared that the bill of review asked that these conveyances be set aside on this ground. These authorities present a strong case."

The Supreme Court of Appeals, in *Dunfee v. Childs*, 59 W. Va. 239, says:

"During the interval between final judgment and commencement of proceedings in error, there is no suit pending, and a purchaser in good faith does not take title *pendente lite*, and is not affected by subsequent reversals of the judgment."

And further:

"I ask if it can possibly be the law that one who buys or recovers land under decree must wait three years for a bill of review, or two years for an appeal, or five years for a motion to reverse, before he can sell to a *bona fide* purchaser and give him good title? Is it the policy of the law to thus tie up land? The decree is presumed to be right until reversed. May not the victor in the suit or the purchaser act upon this presumption? The successful party ought not to have his title

clouded and the value of his property correspondingly diminished for three years by doubtful contingencies: 1. That a writ of error will be sued out; and 2. That a reversal will take place. *Cheever v. Minton*, 13 Am. St. R. 258. So says *Bank v. Bank*, 6 Peters, p. 17."

The same principles of law as expressed in the above opinion are upheld in the case of *McCormick v. McClure*, 6 Blackf. (Ind.) 466, and *Cheever v. Minton*, 13 Am. St. Rep. 258 (a Colorado case).

The history of the title from Charles Hebard unto the Smoky Mountain Land, Lumber and Improvement Company is as follows: The deed of Charles Hebard to P. C. Blaisdell, et al., was a special warranty deed. At the time that P. C. Blaisdell, et al., executed their deed and placed it in escrow, no title had been vested in P. C. Blaisdell, et al., because the deed of Charles Hebard to P. C. Blaisdell, et al., had not been delivered, therefore Blaisdell, et al., gave a quit claim deed.

The depositions of J. Newton Peck and the papers filed by him are conclusive evidence that the Smoky Mountain Land, Lumber and Improvement Company came into active existence about November, 1900, and entered into a contract to purchase the lands in dispute; that the deed placed in escrow was not delivered to the Smoky Mountain Company until January 9, 1903, or later (R., pp. 646-658).

The history of the title as shown by testimony and papers from Charles Hebard to the Smoky Mountain Company filed is (R., pp. 562-632-646-658):

On November 24, 1899, Charles Hebard gave the right of an option in letter form to Messrs. F. L. Andrews, P. C. Blaisdell, et al. The terms of this option were not complied with and it was not consummated (R., p. 657).

On July 12, 1900, F. L. Andrews and P. C. Blaisdell secured $20,000 from J. M. Carpenter, W. L.

Haskell, John F. Stone and J. Newton Peck. Messrs. Carpenter, Haskell, Stone and Peck were given ninety days to examine the lands known as the Charles Hebard lands, and if they did not conclude to purchase, the $20,000 was to be returned to them by Messrs. Andrews, Blaisdell, et al. (R., pp. 652-653, 656-657).

On July 16, 1900, F. L. Andrews, P. C. Blaisdell, et al., and Charles Hebard entered into an agreement different in terms and conditions of the option of November 24, 1899, and Charles Hebard and wife executed a deed for lands in Monroe County, Tennessee, including the lands now in dispute, to P. C. Blaisdell, et al., and said deed was not delivered, but placed in escrow, and was not delivered out of escrow, in accordance with the terms of said agreement, until January 9, 1903, or later (R., pp. 565-656-657-648).

On October 4, 1900, Messrs. Andrews and Blaisdell, et al., agreed to sell an undivided one-half interest in the same tract of land to Messrs. Haskell, Stone, Carpenter and Peck, if they decided to purchase by December 1, 1900, and if they did not decide to purchase, Messrs. Stone, Carpenter, Haskell and Peck, and other parties mentioned, were to have one-twentieth each of the stock of the company organized to purchase said lands (R., p. 653).

On January 28, 1901, P. C. Blaisdell executed a deed for the said lands, including those now in dispute, to the Smoky Mountain Company, which deed was placed in escrow and not delivered to the Smoky Mountain Company until January 9, 1903, or later (R., p. 569).

On February 12, 1901, Messrs. F. L. Andrews and P. C. Blaisdell, et al., sold and transferred their interest in the contract of Charles Hebard for the purchase of these lands to the Smoky Mountain Company (R., p. 653).

On February 12, 1901, a formal paper of subscription to the stock of the said Smoky Mountain Company was executed by those who agreed to become stockholders in said company to purchase the said lands which Charles Hebard contracted to sell to P. C. Blaisdell, et al. (which contract and all its rights had been assigned to the said Smoky Mountain Company, as above stated) (R., p. 654).

Applying the principles as decided in the cases cited, to the facts of this case, we have strong and convincing authority that the Smoky Mountain Company, a purchaser in good faith of the lands in dispute, having purchased said lands after the final decree (July 13, 1900) in the original suit (*Belding v. Hebard*) had been rendered, and before the newly discovered evidence, upon which this suit has been reopened, had been found, *cannot now have its title to these lands affected by a bill of review.*

Petitioners strive to find some ground for distinguishing the cases referred to from this case now at bar. Fortunately the cases referred to in our brief are fully reported and the facts are similar, in effect identical, and the principle of law stated by the courts in their decision is clearly and with great care set forth, viz., that a *bona fide* purchaser of property purchased from the successful party after final decree, cannot have his title affected by a bill of review of which he had no notice at the time he purchased.

Petitioners argue what the law is between equally innocent purchasers which under the facts of this case is not relevant, as appellants purchased from the unsuccessful party after final decree with actual notice, and accordingly protected themselves as per recitals in the deed under which they claim.

We submit, were there no other defence to this bill of review than the one now under discussion, it is suf-

ficient ground upon which this court should dismiss this bill of review.

The deeds, Hebard to Blaisdell, et al., and Blaisdell, et al., to Smoky Mountain Land, Lumber and Improvement Company, show that they included the lands in dispute, and that they were made after final decree in the original suit, *Belding v. Hebard*, July 13, 1900; and furthermore the deeds were in escrow until 1903. The deeds did convey what Mr. Hebard *owned*, and not what he did not own, whereas Belding, et al., in their deed to Hopkins, et al., endeavored to convey what *they did not own*, without receiving money therefor, and Hopkins, et al., endeavored to get something for nothing, and thus cloud the title which had been decreed in Charles Hebard after equity proceedings to remove that cloud.

In the testimony of J. Newton Peck, Mr. Peck was asked by appellants' counsel the following question:

> "Q. When the Smoky Mountain Company took that property over was there not something said guaranteeing you against any action of the Beldings?
>
> "A. Not one word that I ever heard of.
>
> "Q. Was not this property that had been in dispute simply thrown into general purchase?
>
> "A. No, sir" (R., p. 650).

III.

The Court Will Dismiss a Bill if, Upon Looking to All the Circumstances, the Court Deems it Productive of Mischief to Innocent Parties.

In upholding this principle, we cannot do better than refer to the authorities quoted in the opinion of the Circuit Court of Appeals in this case, upon bill of review proceedings, as stated by Judge Knappen in his opinion, from which we quote as follows:

"In the opinion of the majority of the members of this court, the decree of the Circuit Court, dismissing the bill of review, should be affirmed. This bill of review is not filed for error apparent upon the face of the decree, but solely for newly discovered evidence. The rule is well settled, that while a bill of review, on account of error upon the face of the decree, may be filed as matter of right, the granting of a bill of review on account of newly discovered evidence is not of right but of sound discretion in the court. In *Dexter v. Arnold,* 5 Mason, 303, 315, Justice Story, speaking of such a bill, said: 'It may be refused, therefore, although the facts if admitted would change the decree, where the court, looking to all the circumstances, deems it productive of mischief to innocent parties, or for any other cause unadvisable. *Bennett v. Lee* (2 Atk. 528); *Wilson v. Webb* (2 Cox, 3); and *Young v. Keighley* (16 Vez. 348), are strong exemplifications of this principle.'

"The rule thus laid down by Justice Story is not only adopted by the text-books generally, but has been declared and affirmed by numerous decisions, which, as well as the text-books, have generally stated the rule in the precise language of Justice Story. 2 Daniell's Ch. Pr. 1577; Story's Eq. Pl., section 417; *Hughes v. Jones,* 2 Md. Ch. Dec. 289, 296; *Harris, Admx. v. Edmondson,* 3 Tenn. Ch. 211; *P. & M. Bank v. Dundas,* 10 Ala. 661, 669; *Massie's Heirs v. Graham's Admrs.,* 3 McLean, 41; *Craig v. Smith,* 100 U. S. 226, 233; *Ricker v. Powell,* 100 U. S. 104, 107; *Thomas v. Harvie's Heirs,* 10 Wheat. 146, 150; *Stockley v. Stockley,* 93 Mich. 307, 313.

In *Ricker v. Powell* this language was used:

"A bill of review on the ground of newly discovered matter can only be filed on special leave, which depends on the sound discretion of the court to which the application is made. *Thomas v. Harvie's Heirs,* 10 Wheat. 146; *Rubber Company v. Goodyear,* 9 Wall. 805; Story Eq. Pl. 421c; 2 Daniell Ch. Pr. (4th Ed.) 1577. 'It may be refused,

although the facts, if admitted, would change the decree, when the court, looking to all the circumstances, shall deem it productive of mischief to innocent parties, or for any other cause unadvisable.' Story Eq. Pl., section 417; *Griggs v. Gear*, 8 Ill. 2."

In *Craig v. Smith* it was said:

"There is no universal or absolute rule which prohibits the courts from allowing the introduction of newly discovered evidence under a bill of review to prove facts which were in issue on a former hearing. 'But the allowance of it is not a matter of right in the party, but of sound discretion in the court, to be exercised cautiously and sparingly, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause.' Such was the language of Mr. Justice Story in *Wood v. Mann* (2 Sumn. 334) and he states the rule none too strongly."

In *Stockley v. Stockley* it was said:

"An application for leave to file a bill of review is the method employed to obtain a rehearing and to vacate a decree after its enrollment; but the results to be attained, and the fact properly to be considered, are the same as though it were a motion for a new trial, or a motion for a rehearing and to vacate a decree before its enrollment and in like manner it addresses itself to the fair discretion of a court. In passing upon it, each case stands by itself, and is controlled by the circumstances surrounding it, and without reference to any other case. The power of the court in granting or denying it is largely discretionary, and is always to be exercised in view of the peculiar circumstances of each case, so as to effectuate substantial justice, and protect the legal and equitable rights of the parties.

"In the opinion of a majority of the court, the case is one calling for the application of the principle recognized by the decision cited. The appel-

> lants here are purchasers of the lands after decree and under express exception thereof from the covenants of warranty. Their purchase, so far as concerns the lands here involved, was speculative. On the other hand, the Smoky Mountain Company was a good-faith purchaser for value and in reliance upon the decree."

The only inference which can be taken from these words is, that even if all were true which appellants allege in their bill, yet the court would not allow the bill to prevail if the result would be productive of mischief to the innocent party—the Smoky Mountain Company.

The Smoky Mountain Company gave thousands of dollars for the land in dispute, and purchased from the successful party after final decree in the original suit. For over six years previous to the application to file this bill by appellants, said company had suffered the principal paid and its interest to lie in the property, and had paid large sums for taxes, in addition to the expense incidental to caring for the property (R., p. 656).

The petitioners paid nothing for their interest claimed in the property, *or, if they did, they had no legal or equitable reason for doing so,* as the title of record showed their grantors did not have any title to said lands.

Hence, even were we to admit petitioners' statements as to what the newly discovered map establishes, equity would be compelled to deny the prayer of their bill. Appellants cannot prevail in a court of equity as to interest claimed in these lands based upon no payment, or upon payment (which petitioners never have asserted) made to grantors, when a final decree was on record declaring that said grantors had *no* title, *as against* the Smoky Mountain Company, a *bona fide*

purchaser of the successful party, after a final decree, in the original suit.

The mere statement of the facts is sufficient to demonstrate that there is no principle of equity upon which appellants may base the prayer of their bill of review; *on the contrary, the very significance of the word "equity" demands and directs the dismissal of this bill of review under the facts of this case.*

IV.

In Equity the Federal Courts Will Follow the Analogy of the State Statutes of Limitations, Unless the State Statute Conflicts With Some Statute of Congress, or Unless Some Higher Equity Under the Facts of the Case Would Render the Application of the Statute Inequitable.

Section 4848, Shannon's Code of the Statute Laws of Tennessee, provides:

> "No bill of review shall be brought or a motion made therefor, except within three years from the time of pronouncing the decree, saving to infants, married women, persons of unsound mind, imprisoned or beyond the limits of the United States, a right to a bill of review within three years after such disability has been removed." See also Tennessee Act 1801, chapter 6, section 53.

The court in *Elmendorf v. Taylor*, 10 Wheaton 168, says:

> "Although statutes do not, either in England or in these states, extend to suits in chancery, yet the courts in both countries have acknowledged their obligation. Their application we believe has never been controverted, and in the recent case of *Thomas v. Harvie Heirs* (10 Wheat. 146), decided at this term, it was expressly recognized."

Teckheimer v. Baum, 37 Fed. Rep. 175, holds, where a right is peculiar to the law of the state, and

has no existence in the general jurisprudence of equity in the Federal courts,

> "It is now settled, however, that the courts of the United States may administer an equitable right granted by the law of the state in suits of which, from other reasons, they have jurisdiction."

Also in *Aspen Mining Co. v. Rucker,* 28 Fed. Rep. 222, the court says:

> "It is doubtless true that the jurisdiction of the Federal courts, sitting as courts of equity, is not dependent upon or limited by any state statutes. Neither is the practice therein prescribed by state legislation. Yet it is equally true that an enlargement of equitable rights, given by a state, may be administered in a Federal court. *Holland v. Challen,* 110 U. S. 15. I take it in this respect there is no difference between a legal and an equitable right. The Federal courts enforce and administer the laws of the state; and if any right, legal or equitable, be given by a state statute, the non-resident litigant who may come, or be forced, into a Federal court may avail himself thereof. Such I understand to be the general rule. Any exceptions thereto arise either because the state statute conflicts with some general legislation, or because the right granted is not in its nature administerable in Federal courts. *Clark v. Smith,* 13 Pet. 195; *Brodeuck Mill Case,* 21 Wall. 520."

The case *Davey v. Briggs,* 97 U. S. 628, applies a statute of limitation of North Carolina (and the interpretation of the statute as given by the North Carolina courts) in a suit involving title to land.

Rose's Code of Fed. Proceed., section 870, says:

> "In equity the Federal courts are not strictly bound by any statutory provisions, though they will usually follow the analogy of the statute at

law," and refers to subdivision *M.* of section 10, pages 89, 90 and 91, of volume 1, of said text and the many cases thereunder.

The case *Mexican Nat. Coal, Timber and Iron Co., et al., v. Frank, et al.,* 154 Fed. Rep. 217, held that a state (Texas) statute of limitation of action, while such action does not govern per se in suits in equity the Federal courts, yet the statute will be applied by analogy under equitable circumstances.

There is no Federal statute which conflicts with the Tennessee Statute of Limitations quoted above, and equity and the facts of this case and the foregoing authorities require that the analogy of the statute be followed.

The legal proposition stated is not that state statutes control the procedure of Federal courts, nor that the Federal courts must apply the state statutes and the state court's interpretation of those statutes. The principle urged is:

> "In equity the Federal courts will follow the analogy of the state Statutes of Limitations, *unless the state statutes conflict with some statute of Congress, or unless some higher equity under the facts of the case would render the application of the statute inequitable.*"

The issue in the original suit, Hebard v. Belding, was one in which the Tennessee Courts of Equity and the Federal Courts of Equity had concurrent jurisdiction, to which the principle as decided in the line of cases represented by *Godden v. Kimmell,* 99 U. S. 201, applies, to wit:

> "In cases of concurrent jurisdiction, Federal Courts of Equity consider themselves governed by the Statute of Limitation which govern the state courts of law."

The Tennessee Statute of Limitation contended by us to govern in this case specifically applies only to an equitable remedy. If Federal Courts of Equity require applying a state Statute of Limitation which governs a court of law in cases of concurrent jurisdiction, surely equity in the Federal courts requires that it apply a state Statute of Limitation (in cases otherwise of concurrent jurisdiction) which specifically governs the particular remedy sought.

If this suit were within the courts of Tennessee, respondent's title to these lands could not now be affected by a bill of review, which fact, under the authorities quoted, precludes respondent's title from being now disturbed by a bill of review in this court.

We cite the following Tennessee authorities:

Nelson v. Schaeffer, 107 Tenn. Rep. 300;
Anderson v. The Bank, 5 Snead, 664;
Winchester v. Winchester, 1 Head, 465.

V.

A Bill of Review Not Brought Within the Period for Writs of Error After the Discovery of the New Evidence Upon Which Bill of Review is Based, Cannot Prevail.

Story's Equity Pleading, 9th edition, section 419, declares:

> "The question may arise, whether the like limitation applies to bills of review upon new-discovered facts and evidence. *There can be no doubt that it will be a good bar, that the bill of review is not brought within the period limited for writs of error, after the discovery of the new facts or evidence.* Whether any bill of review will lie after the lapse of that period, from the time of making the decree, although the bill of review is brought within the prescribed period after the discovery

of the new facts or evidence, there does not seem to be any decision settling the point; and as the allowance of a bill of review for new discovered evidence is discretionary with the court, it is scarcely probable that it will arise in judgment, as the lapse of time will always have great weight within the court in refusing the application, in connection with the other circumstances."

In the case of *Thomas v. Harvie Heirs*, 10 Wheat. 146, which was upon a bill of review (appeals in equity at the time were limited to *five years* after the decree under the Judiciary Act of 1789, U. S.), in deciding the question the court says:

"The record shows that the order of the court permitting a bill to be filed was granted eight years subsequent to the final decree in the original case, and the question to be decided is whether this remedy was not barred by length of time. It must be admitted that bills of review are not strictly within any Act of Limitation prescribed by Congress, but it is unquestionable that courts of equity, acting upon the principle that *laches* and neglect ought to be discountenanced, and within cases of stale demand its aid not to be afforded to suits brought in these courts.

"These principles seem to apply very strongly to bils of review in the courts of the United States, and from the circumstances that Congress has thought proper to limit the time within which appeal may be taken in equity, causes thus creating an analogy between two remedies by an appeal and bill of review so apparent, that the court is constrained to consider the latter as necessarily comprehended within the equity of the provisions respecting the former."

The court further says:

"Whether a bill of review founded upon matter discovered since the decree is in like manner barred by the lapse of five years after such de-

cree, is a question which need not be decided in the present case, since we are all of the opinion that it is the discretion of the court to grant leave to file a bill of review for that cause, and that such leave ought not to be granted in the case where it appears that the plaintiff is not aggrieved by the decree on account of error as assigned."

In *Reed v. Stanley,* 97 Fed. Rep. 526, the court holds that the time within which a bill of review may be filed is limited by analogy to the period allowed by statute to taking an appeal in the case, and after quoting largely from *Thomas v. Harvie,* 10 Wheat. 148, says:

"From this it will be seen that an original decree cannot be brought before an appellate court for re-examination by means of a bill of review, after the expiration of the period prescribed by statute for an immediate appeal from such decree, otherwise as said by the court cited, the party complaining of the original decree would by such means be permitted to do indirectly what the Act of Congress has prohibited him from doing directly."

To the same effect are,

Clark v. Killian, 103 U. S. 769;
Trust Co. v. Grant Loco. Works, 108 U. S. 227;
Rector v. Fitzgerald, 59 Fed. 812.

From the year 1789 (Judiciary Act of U. S. 1789) to the year 1878 (U. S. Revised Statutes 1878, section 1008), a writ of error or appeal would lie from a judgment, decree or order of the Circuit Court or District Court, if *taken within five years* after the entry of such judgment, decree or order.

From the year 1878 to the year 1891, *the period for* hearing such a writ of error or appeal, *was two years,* and since 1891 no appeal can be taken or writ

of error sent out to review a decision of a Circuit Court of Appeals *unless within one year* after entry of the order, judgment or decree sought to be revised.

U. S. Compiled Statutes, 1901, page 550, 26 Stat. at Large, 828, Sec. 6.

Therefore under the law it is clear this bill of review based upon newly discovered evidence should, at least, have been brought within one year after the discovery of the map of 1821.

We think it is axiomatic to assert that **when a public document has been lost, and later found and placed among the public records, in the custody of the proper public officer, to have charge of the same, the document is no longer a lost document** and cannot, years afterward be urged as the basis of a legal proceeding as "newly discovered" evidence by one who, "years afterward," has just "heard" of its existence. The date of its being "newly discovered" is certainly when said document comes into the custody of the proper public official to have the same in his care. If petitioners desired to keep their rights alive by due diligence, they should at least have inquired of such public officer, whose duty it was to have custody of said documents once a year.

Let us consider the facts of the case now before the court:

1. Not later than February 29, 1904, the newly discovered map was found by the State Archivist of Tennessee, and placed in the public archives of the state. The newly discovered report of the commissioners of 1821 was found by the same person, in the same place and at the same time, and placed in the public archives of the state (R., pp. 464-639).

2. The discovery of said map was given wide notoriety by the public press (R., pp. 556, 639, 640).

3. The archivist of Tennessee made certified copies of said map as early as March, 1905, for other people (R., pp. 639-754).

4. On March 26, 1906, Mr. Cozad, representative of Hopkins, et al., obtained a certified copy of this map (R., pp. 543-662).

5. On September 25, 1906, petition for permission to file a bill of review was presented to the United States Circuit Court of Appeals of the Sixth Circuit by Hopkins, et al. (R., p. 715).

6. On August 6, 1907 (nearly one and one-half years after they had received their certified copy of said map), Hopkins, et al., filed their petition to file a bill of review in the United States Circuit Court at Knoxville (R., pp. 421-432).

It is thus shown that Hopkins, et al., did not seek permission to file a petition until two and one-half years after the newly discovered evidence had been found by the archivist of the State of Tennesse and placed in the public archives of the state. It is further to be observed that there is no evidence that Hopkins, et al., during a period of six years after the final decree in the original suit of *Belding v. Hebard* entered July 13, 1900, made any inquiry of the State Departments of either Tennessee or North Carolina as to whether any map or papers had been found affecting the State Line between Tennessee and North Carolina.

The contention of appellants is that their *laches* must be reckoned as from the time when they first heard, or learned, of said map's discovery, and not from the date that it was found and placed in the proper public archives. That the only duty of diligence they were under was, that should they at any time chance to hear by rumor of the discovery of any

new evidence they were to exercise due diligence thereafter.

If this principle be true for two and one-half years, should not the same principle apply had appellants not learned of this newly discovered evidence for ten years thereafter, or twenty years thereafter, so long as they moved with reasonable diligence after they heard "the rumor" of the newly discovered evidence? Clearly, such a contention is not the law as to *laches.*

Not later than February 29, 1904, the State Archivist of Tennessee, as shown above, placed the map and report of the joint commissioners in the public archives of Tennessee, and made certified copies for other people as early as March, 1905. Not until September 25, 1906, did petitioners apply to the Circuit Court of Appeals for permission to file bill of review, and not until August, 1907, did they apply to the Circuit Court below.

The discovery of the said map by a public officer, and placed by him in the public archives where the lack of diligence of the complainants caused its discovery to be unknown to them for a period of over two years is gross laches, especially when they made no inquiry in a period of six years.

It is also to be noted Hopkins, et al., petitioners, did not actually file their petition for leave to file bill of review in the United States Circuit Court for nearly one year and a half after they had received their certified copy of said map per their representative, Mr. Cozad.

If appellants for over six years made no inquiry of the public officers of the respective states, as to whether or not the said map and report of the commissioners had been discovered, appellants are not now entitled to complain of the final decree.

Further, evidence of the lack of diligence on the part of appellants is shown by the bill, where it states, "and further attempts were made to find said written report accompanying said map. . . . But after the most diligent search no other papers connected therewith could be found; . . ." (R., p. 430). *When, as a matter of fact, the report of the joint commissioners was discovered at the same time, at the same place and by the same person as was the said map* (R., p. 464). A certified copy of this report was secured and filed by the appellee in this case.

Finally, that a bill of review, predicated upon newly discovered evidence, might prevail, after the lapse of the period of appeal, if the bill be brought within the period limited for appeals after the discovery of the new facts or evidence, if the court in its discretion should so allow, is a principle asserted as *dicta* in various cases. Nevertheless so cautiously and sparingly have the courts permitted this remedy to prevail, after the lapse of the period limited for appeals, that we are unable to find the report of a case in the Federal courts, after a careful search, where a bill of review, based upon newly discovered evidence has been allowed *to prevail* after the lapse of the period limited at the time for appeals.

Story's Equity Pleadings, 9th edition, section 419, quoted above, apparently recognizes the same fact.

> "Whether any bill of review will lie after the lapse of that period, from the time of making the decree, although the bill of review is brought within the prescribed period after the discovery of the new facts or evidence, there does not seem to be any decision settling the point; and as the allowance of a bill of review for new discovered evidence is discretionary with the court, it is scarcely probable that it will arise in judgment, as the lapse of time will always have great weight within the court in refusing the application, in connection with the other circumstances."

In other words, there appears to be no reported case where, as in this case, the bill of review was brought six or seven years after a final decree and said bill of review has been allowed to prevail to affect interests vested in accordance with the adjudication of the original final decree.

VI.

The Denial of the Circuit Court of Appeals of the Motion of Petitioners "to Remit the Records to the Lower Court With Permission to Make a Certain Copy of Field Notes, as Evidence, Part of the Record."

After the case had been argued and submitted to the said Circuit Court of Appeals, complainants, Hopkins, et al., on January 27, 1911, filed in said Circuit Court of Appeals a petition to remit the record to the United States Circuit Court at Knoxville, Tennessee, alleging the discovery of a copy of the field notes of William Davenport, surveyor for the State of North Carolina, on the survey of the State Line between North Carolina and Tennessee in the year 1821. The order of the Circuit Court of Appeals was:

> "It is now here ordered that the motion stand over with leave to complainants' counsel to file within twenty days affidavits with respect to the authenticity of the field notes, and with leave to defendants' counsel to file within twenty days thereafter counter affidavits."

Under this order of the court petitioners proceeded to take depositions to which procedure respondent excepted. The testimony of all witnesses and affidavits offered, established that said field notes were not the original field notes made by William Daven-

port, the North Carolina surveyor, with the commissioners of 1821, as alleged by petitioners, or by anyone else. The field notes were shown to be in the handwriting of some other person than said William Davenport. There was no evidence to show from what said notes were copied.

Clearly they would not have been admissible in evidence in the original suit. The familiar rule of evidence that to admit in evidence a paper purporting to be a copy, it must first be shown that the original existed and that the original was lost or destroyed, or is not available, would have excluded these so-called notes in any court. It is not shown that any field notes ever existed of the survey and certainly none were ever adopted by the commissioners of 1821, as far as the evidence in the case discloses. There is no evidence what the original field notes contained, *assuming* that there were any, and there is no evidence that the alleged notes are purported to be copies of any one's field notes, and therefore no evidence that they are accurate or substantially complete copies.

Further, said notes would not be material even if they had been the original notes of William Davenport, said North Carolina surveyor. There is no reference in the report of the commissioners, the confirmatory acts of the respective states, or the map of 1821 to any field notes. The report of the commissioners and their map called for natural monuments on the portion of the line in dispute, and disclose that the natural monuments called for are not set forth in the field notes. Even if these field notes had proven to be the actual copy of the original field notes of William Davenport, as made by him during the State Line survey of 1821, the controlling evidence being that the commissioners never adopted said field notes, the notes would be immaterial.

The map and report of the commissioners and the confirmatory acts of the states set forth no calls for courses and distances until the line leaves the extreme height of the mountains, from which point the report and confirmatory acts of the respective states call for a course "due south," which is the only course mentioned. The calls from the beginning to the Tennessee River is "with the extreme heights of the Great Smoky Mountain, crossing the Tennessee River—from the Tennessee River to the main ridge and with the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain." The report, the map, the confirmatory acts of the states, the Cession Act of 1789, describing the line, call for its location on mountains immediately north and south of the banks of the Tennessee River and we submit that the court is controlled by this fact.

It is quite possible that the Tennessee surveyor surveyed the Hangover Line and the North Carolina surveyor the Slick Rock Creek route. The material fact is that the commissioners did not adopt the Slick Rock Creek Line, but did adopt the Hangover Line as is made evident by their map, their report and all the various acts describing the line adopted by them.

It has always been admitted that a survey line was probably made up Slick Rock Creek by the commissioners' party, but, as found by the courts below, the commissioners abandoned the Slick Rock Creek Line and adopted the Hangover Line.

The Circuit Court of Appeals below properly denied the motion to remit the record to the Circuit Court to admit in evidence these field notes. At most the disposal of this motion was within the discretion of the court. They are not original notes, and what they are copies of cannot be proven. Further, the report and map of commissioners and the confirmatory acts of the respective states, do not call for any field notes, but

do call for natural monuments which control. Even as previously stated, had the field notes been proven to be those made by William Davenport during the survey, since said commissioners make no call for natural monuments contended for by petitioners, to wit, up a "creek" for six miles, but in fact call for the line adopted by them for the said six miles as being located on mountain tops, under no circumstances could the notes be material.

The petitioners having had one bill of review were in no event entitled to a second, even had their supposed evidence been material.

VII.

The Determination of the Issue in the Case of North Carolina v. The State of Tennessee, a Case of Original Jurisdiction and on the Docket of This Court, Cannot Affect the Decree as to the Parties in This Suit Now Before the Court.

Petitioners have urged that this is a curious and anomalous case by reason of the fact that there is pending for hearing at the present time in this court a case of original jurisdiction, brought by the State of North Carolina against the State of Tennessee, to decide the boundary line between the two states and involving the location of that portion of the State Line which was originally in dispute in this case.

The decree of the United States Circuit Court of Appeals in this case is that the title to the lands in dispute is valid in Hebard, the party under whom respondent claims, and void as to Belding, et al., those under whom petitioners claim. Said decree cannot in any manner affect the decision or decree in the case of North Carolina v. Tennessee, which issue is as to the jurisdiction and sovereignty of the states, nor can the decision as to the jurisdiction and sovereignty of the

states, whatever it may be, ever affect the decree as to the parties in this suit.

The issue in this case is *res adjudicata,* as to the parties, determining the title to the lands and not the jurisdiction and sovereignty of the states.

The United States Judiciary Act of 1891 enacts, *inter alia,* that the United States Circuit Court of Appeals shall be the final Court of Appeals, for all suits between parties claiming under grants of different states, and as it necessarily follows in a suit arising between parties, claiming under grants of different states, that the state boundary would be involved, there can be no question that a case such as this was in the mind of Congress when it passed the act referred to, and it does not appear than anyone except petitioners have ever regarded this as anomalous. The deductions suggested by petitioners that the fact of the decision by the United States Supreme Court in the case pending in this court referred to, to wit, North Carolina v. Tennessee, if the court should decide that the line was located as contended for by petitioners, would be to reinvest title to the lands in dispute in the State of North Carolina, we submit is not worthy of serious discussion.

The decree of the Circuit Court of Appeals which adjudicated a title claimed under a senior grant of North Carolina to be void would not enable a title claimed under a junior grant of North Carolina to prevail. The State of North Carolina having by solemn grant conveyed the title it claimed to have, would under the laws of North Carolina as well as every other state, have nothing to convey by purported junior grants.

We submit further that this question has already been decided by this court in the case above referred to; the State of North Carolina v. the State of Tennessee. In that case the Babcock Lumber and Land

Company, claiming to have succeeded to the title of respondent in May, 1909, filed a petition praying for leave to intervene in the case, on the ground that their title would be clouded by an adjudication in the case between North Carolina and Tennessee, if it should be held that the lands, which it had purchased from the respondent, were in the State of North Carolina. To this petition the State of North Carolina answered, denying the right of the Babcock Lumber and Land Company to intervene in the case, on the ground that the rights of the Babcock Lumber and Land Company could not be prejudiced by a decree of a boundary line between the states, although that decree might put the land in controversy under the jurisdiction and sovereignty of the State of North Carolina, because the issue in suit in this court between North Carolina and Tennessee was for the purpose only of establishing a boundary line, and would affect only the question of jurisdiction and sovereignty of the states, and not affect the private titles of individuals or decrees theretofore made. And the said State of North Carolina did set up in the paper filed in that suit—by its counsel, who are of counsel in this case—called a brief for complainant, meaning the State of North Carolina, in opposition to the motion of the Babcock Lumber and Land Company for leave to file petition to intervene and become a party defendant in this case, that

> "The subject matter of this controversy is a State Line. Nobody is interested in that subject matter except the two states. The direct consequences of fixing the line affecting private interests do not concern the states. They are property rights to be settled between private parties in some other manner."

The application by the Babcock Lumber and Land Company to intervene in the suit pending in this court

between North Carolina and Tennessee, was refused by this court. While not filing any opinion, it is evident that the refusal by this court of the petition of the Babcock Lumber and Land Company for intervention was made on the ground that the Babcock Lumber and Land Company would not be affected or interested in the litigation and decree therein between the two states to establish the boundary line.

In *Fowler v. Lindsay,* 3 Dallas, 411—which was a suit in ejectment arising out of the fact that a State Line between Connecticut and New York had never been authoritatively settled—the State of New York tried to intervene and this court held that a decision as to the right of soil between individual citizens can never affect the right of the state as to the soil or jurisdiction.

Afterwards, in the case of New York against the State of Connecticut, 4th Dallas, 1, the State of New York tried to enjoin the prosecution of suits depending on that State Line location and this court denied the right of the state to interfere in the matter in any way, on the same ground, to wit, that it was not the pary in interest, nor affected in any way by any litigation between private parties. The rule certainly works both ways.

The case of Fowler v. Lindsay even goes further in settling the question raised, for, in rendering the opinion of the Supreme Court of the United States, Washington, Justice, says:

> "It is not sufficient that a state may be consequently affected, for in such case (where the grants of different states are brought into litigation) the Circuit Court has clearly a jurisdiction; and this remark furnishes an answer to the suggestions that have been found on the remote interest of the state in making retribution to her grantees upon the event of an eviction.

"It is not contended that the states are nominally the parties, nor do I think that they can be regarded as substantially the parties to the suits; nay, it appears to me that they are not even interested or affected. They have a right either to the soil or to the jurisdiction. If they have the right of soil they may contest it at any time in this court, notwithstanding a decision in the present suits and though they may have parted with the right of soil, still the right of jurisdiction is unimpaired. A decision as to the former object between individual citizens can never affect the right of the state as to the latter object; it is *res inter alios acta.*"

Justice Cushing, filing an opinion in the case of Fowler v. Lindsay, says:

"Whether the land lies in New York or Connecticut does not appear to affect the right or title to the land in question. The right of jurisdiction and the right of soil may depend upon different words, charters and foundations. A decision of that issue can only determine the controversy as between the private citizens who are parties to the suit, and the event only give the land to the plaintiff or defendant, but could have no controlling influence over the line of jurisdiction."

Also,

New York v. Connecticut, 4 Dallas 1;
Rhode Island v. Massachusetts, 12 Peters 657-726-727.

In other words, the boundary line between two states may be passed upon by a Circuit Court in determining the rights of individuals, but the decision of a Circuit Court in determining the rights of individuals, by locating a boundary line between states, does not prevent nor affect the right of this court to relocate or find a boundary line between the two states for jurisdictional purposes. The only effect which a decree

in the case pending in this court, between North Carolina and Tennessee, finding a different boundary line than the one established in the case in the Circuit Court would have would be that if the lands adjudged to belong to the respondents were found by a decree in this court to be in North Carolina that they would pay taxes to North Carolina and be subject to the jurisdiction of North Carolina in all police regulations and law; but it would not affect the rights adjudicated in this case by the Circuit Court and Circuit Court of Appeals.

It is true that Charles Hebard claimed under grants from the State of Tennessee, and that Belding, et al., defendant in the original suit, claimed under grants from the State of North Carolina, but it is also true that the Smoky Mountain Land, Lumber and Improvement Company, in addition to claiming under the title which was vested in Charles Hebard prior to 1898, purchased said lands after the decree of the said Circuit Court at Knoxville, Tennessee, of June 10, 1899, affirmed by the Circuit Court of Appeals, July 13, 1900.

If there ever was any virtue in the statement and argument of petitioners as stated in their brief and petition, we submit that when the same should have been urged, if at all, was within one year from July 13, 1900, and not fourteen years afterward.

REPLY BRIEF.

It is our desire not to impose upon this court an unduly extended brief beyond the need of properly presenting the case. It appears necessary, in reply to complaint's brief, in order to, at least, point out some of the misleading and incorrect statements or deductions contained therein.

On page 5 of complainants' brief it states:

> "Surveyors who testified for Hebard in the original case found certain marked trees running down toward the Tennessee River from a point about half a mile to a mile northeast of the Tennessee River from the top of the ridge on the Great Iron or Smoky Mountain Ridge."

This statement is only a part of the truth and thereby misleading. The fact is, it was admitted by both parties to this litigation that the State Line north of the Tennessee River was undisputed to a certain "spruce pine" or hemlock tree, marked as a State Line fore and aft tree, standing on or near the north bank of the Tennessee River (R., p. 336-404). That said State Line fore and aft tree was so marked as to show that the line there crosses the river to the south bank, was found and held by the master and the courts in the original case (R., p. 405) and not denied in the evidence by complainants.

On page 93 of said brief, it is stated:

> "Libby says it is impossible to go over the Hangover Lead and fit the map of 1821."

Under cross-examination (R., p. 521), question 18, Mr. Libby answered as follows:

> "It would be impossible for any civil engineer or surveyor to take that map and locate it according to the north point there and fit it *on any ridge* that is in that country today."

On page 97, it is stated, and argument made thereon, that "The Unaka Mountain commences at the junction of Hangover and Fodder Stack," when, as a matter of fact, there is a stipulation filed in this case (R., p. 327), paragraph 2 of which reads as follows:

> "That the main ridge of the mountain dividing Tennessee and North Carolina does not begin to be called Unaka, Unacay or Unicoi Mountain until it reaches a point about fifteen (15) miles southwest of the Junction of the Hangover and Fodder Stack Leads,"

which stipulation in accordance with the facts as they are, shows the fallaciousness of the argument which follows the untrue statement made on page 97 in said brief.

On page 101 it is said, "everyone of our witnesses say that it is impossible for that creek to be anything else than Slick Rock Creek." W. P. Chambers, witness for complainant, testified that the "creek" is not laid down correctly on the map (R., p. 619).

Denton, surveyor for complainants, says that the creek marked on the map cannot possibly be Slick Rock Creek, if it is correctly marked on the map (R., p. 539).

On page 22 of said brief it is stated that the contract for the purchase of what is known as the Belding lands was made by the complainants in the "early part of 1900—about April," which evidently is inserted to leave the impression that this was a fact as to the first contract made by the complainants in the matter. The facts as shown by the evidence are that there was no contract entered into by complainants for the purchase of said lands until October 29, 1900 (R., p. 676-678), and the so-called contract of purchase was merely an option to purchase.

On page 103 the complainants make the following incorrect statements:

> "The testimony of J. Newton Peck, taken at the same time, which shows that the option to purchase the lands claimed by them in this case was taken in November of 1899, eight months before

the original case was decided in the Circuit Court of Appeals, and the lands are described as forty-one thousand acres in Monroe County, Tennessee, and evidently did not include anything except what Mr. Hebard had previously owned there, and that the deed subsequently made was substantially a quit-claim deed, which does not make the vendee an innocent purchaser."

This general statement is evidently meant to indicate that the Smoky Mountain Company in November of 1899 had an option on these lands, or that the parties who had the option represented the Smoky Mountain Company, which as to both the exact facts and the spirit of the statement is untrue. The testimony in the case and the papers filed with the depositions of J. Newton Peck at Cincinnati on June 19, 1909, show to be untrue the statement that the lands are described as 41,000 acres, *and "evidently did not include anything except what Mr. Hebard had previously owned there,"* in that complainants' statement is evidently meant to indicate that the deeds from Mr. Hebard and P. C. Blaisdell did not include the Slick Rock Basin, the lands now in dispute. The deeds show that they included the lands in dispute, and the deeds were made after final decree in the original suit, Belding v. Hebard, July 13, 1900, and were in escrow until 1903. The deeds did convey what Mr. Hebard *owned*, and not what he did not own, whereas Belding, et al., in their deed to Hopkins, et al., endeavored to convey what *they did not own*, without receiving money therefor, and Hopkins, et al., endeavored to get something for nothing, and thus cloud the title which had been decreed in Charles Hebard after equity proceedings to remove that cloud. In the testimony of J. Newton Peck, Mr. Peck was asked by complainants' counsel the following question:

"Q. When the Smoky Mountain Company took that property over was there not something said guaranteeing you against any action of the Beldings?

"A. Not one word that I ever heard of.

"Q. Was not this property that had been in dispute simply thrown into the general purchase?

"A. No, sir." (R., p. 650.)

The deed of Charles Hebard to P. C. Blaisdell, et al., was a special warranty deed. At the time that P. C. Blaisdell, et al., executed their deed and placed it in escrow, no title had been vested in P. C. Blaisdell, et al., because the deed of Charles Hebard to P. C. Blaisdell, et al., had not been delivered, therefore they gave a quit-claim deed.

The depositions of J. Newton Peck and the papers filed by him are conclusive evidence that the Smoky Mountain Land, Lumber and Improvement Company came into active existence about November, 1900, and entered into a contract to purchase the lands in dispute; that the deed placed in escrow was not delivered to the Smoky Mountain Company until January 9, 1903, or later.

The history of the title as shown by testimony and papers from Charles Hebard to the Smoky Mountain Company is set forth in this brief on pages 72, 73 and 74.

Complainants also contend that the deed to respondent was substantially a quit-claim deed and "does not make the vendee an innocent purchaser." The facts of the case, however, do make or establish the respondent an innocent purchaser for value, upon the principles which are decided in the case of *Moelle v. Sherwood*, 148 U. S. 21, from which case we quote as follows:

"The character of bona fide purchaser must depend upon attending circumstances or proof as

to the transaction, and does not arise as often, though, we think, inadvertently, said, either from the form of the conveyance or the presence of, or the absence of, any accompanying warranty."

On page 98 of said brief it is stated:

"Whatever that map may show or not show, one thing is conclusively established by it, and that is, that the commissioners did not cross the river with their line at the so-called bluff or series of bluffs leading to the Hangover. This, both Hale and Muller, Hebard's old witnesses, now reluctantly admit. (See Muller's testimony, R., pp. 190, 191, 192, 193; Hale, p. 213)."

Evidently counsel refers in this quotation to the record of this case at pages 584, 585, 586, 587, as to Muller's testimony, and as to Hale's testimony (R., p. 603).

The testimony referred to in no manner whatever justifies this statement. Complainants' counsel was evidently trying to get the witness to say that if the line did cross the river at the mouth of Slick Rock Creek there was no bluff there, and no ridge at Slick Rock Creek leading up to the Hangover. In regard to the bluffs, all that the witness stated was that the entire south side of the Tennessee River, from the Cheoah River to the Slick Rock Creek, was a series of bluffs. They in no manner stated that the State Line did *not* cross the river where it is contended by respondents that it does cross, and immediately on crossing follows a lead, ridge or spur direct to the Hangover Mountain. No one contends the line goes to the Hangover Mountain following a bluff, but merely that where the line strikes the south bank of the river the said bank is a bluff. The line strikes the bluff but does *not* follow it. The distortion of the testimony as quoted with its deduction by complainants is intended, evidently, to make

an impression that respondents' witnesses admitted complainants' contention, which the record shows is untrue.

Complainants, on page 21 of their brief, express that in *their* opinion the permission given by the United States Circuit Court of Appeals at Cincinnati to Hopkins, et al., to file their petition for bill of review in the United States Circuit Court at Knoxville, Tennessee, should be regarded by this court as a matter of great weight.

As a matter of fact, we think it will be admitted by this court that such leave by an appellate court upon any such application, provided reasonable cause is alleged by sufficient affidavit, is granted by said appellate court practically as a matter of course, accepting the allegations as made by the petitioner to be true. The purpose of this remarkable statement by complainants in their brief is, we think, apparent.

Upon reading complainants' brief an impression would be left therefrom that respondent claims that the line, on leaving the south bank of the Tennessee River, is at that point at once located on the *main ridge, i. e.*, that respondent claims the main ridge reaches the Tennessee River. Neither in the original case nor upon these bills of review proceedings has that been the claim of respondent. What was claimed by Hebard in the original case and has been and is claimed by respondent in this case, is that the line from the undisputed fore and aft State Line tree on the north bank of said river crosses the river, as shown by the fore and aft marks on said three, direct to the south bank of the Tennessee River, and thence immediately is located upon a lead, or ridge, or spur, leading direct to Hangover Peak, which mountain the line thereby strikes in about four and one-half or five miles from the river, thence that the line follows the main

Hangover Mountain as the main ridge to the "Junction" where the line is intersected by the line contended for by complainant.

Complainants, in their brief, state that it has been shown, to their satisfaction, that there is no question in this case regarding an innocent purchaser, and then proceed to devote pages of their brief in an endeavor to support their position.

Complainants, in addition to quoting text-books on general principles, which is so often done by counsel when the authorities are not with him, quotes largely from the case of the *U. S. v. Samperyac, et al.*, 27 Fed. C., p. 932 (which case also appears in the United States Supreme Court Reports, 7 Pet. 241), in argument upon the question of innocent purchaser for value. This case, upon its facts, of fraud, etc., is in no wise in conflict with the principles decided in the cases quoted on the issue by respondent, such as *Rector v. Fitzgerald*, 59 Fed. Rep. 808, and *Ohio River R. Co. v. Fisher*, 115 Fed. 929.

We note, however, that this case of *U. S. v. Samperyac* has been regarded as standing on its own set of facts, as it does not appear to have ever been quoted subsequently by this court. The court finally said in that case, 7 Peters, on page 242:

> "Upon the whole, we think, Stewart was improperly admitted to become a party; *but, considering him a proper party, he has shown no ground upon which he can sustain a right to the land in question.*"

We respectfully submit the decree of the court below should be affirmed.

JOHN FRANKLIN SHIELDS,
WILLIAM A. STONE,
T. E. H. McCROSKEY,
Counsel for Respondent.

APPENDIX.

I. Map of disputed Territory showing lines contended for by each party.

II. Map of 1821 as it is.

III. Map as it would have to be to support contention of Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 232.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, FRED W. BRUCH, GEORGE REEVES, AND JOHN MATTHEWS, PETITIONERS,

vs.

CHARLES HEBARD AND THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY, RESPONDENTS.

MOTION TO HEAR AFTER HEARING OF ORIGINAL CASE No. 4.

To the Honorable the Supreme Court of the United States:

The petitioners and appellants, William R. Hopkins, Benjamin P. Bole, Edward I. Leighton, Fred W. Bruch, George Reeves, and John Matthews, now come and move the court to set the above-entitled case for hearing immediately after the case of The State of North Carolina *vs.* The State of Tennessee, a case of original jurisdiction pending

in this court and being Original Case No. 4, upon the following grounds and for the following reasons, to wit:

The controversy in this case involves primarily the true location of the State line between the States of North Carolina and Tennessee from a point on the south bank of Tennessee River to a point some miles southwesterly of said river, and that is the vital question of fact in this case.

This case was admitted to this court upon a writ of certiorari and the record of the courts below removed into this court for examination upon said writ, on the ground that it involved, in respect to the question of fact, to wit, the true location of said State line, precisely the same question as was involved in the said case of The State of North Carolina *vs.* The State of Tennessee, and your petitioners believe that in granting said writ of certiorari this court was moved by the consideration that said question of fact as to the true location of said State line was involved in both cases and should be disposed of at one time.

Your petitioners further represent that the evidence in said case of The State of North Carolina *vs.* The State of Tennessee was taken at a later time and is more complete, especially by reason of including evidence of the first importance, the existence of which was unknown at the time the record in this case was made up, and your petitioners therefore state to the court that the ultimate fact involved in both cases can be more correctly and conclusively determined upon consideration of the evidence in both cases.

WILLIAM R. HOPKINS,
BENJAMIN P. BOLE,
EDWARD I. LEIGHTON,
FRED W. BRUCH,
GEORGE REEVES,
JOHN MATTHEWS,
By C. BENTLEY MATTHEWS,
Attorney.

No. [redacted]80 October Term, [redacted]1914

IN THE

Supreme Court of the United States.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, FRED W. BRUCH, GEORGE REEVES, and JOHN MATTHEWS,

Petitioners,

v.

CHARLES HEBARD and THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,

Respondents.

Motion to Hear Immediately After Hearing of Original Case No. 4, Assigned for Argument, October 13, 1914.

THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,
By
JOHN FRANKLIN SHIELDS,
WILLIAM A. STONE,
T. E. H. McCROSKEY,
Attorneys.

International, 216 Chestnut St.

IN THE

Supreme Court of the United States.

October Term, 1913. No. 232.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, FRED W. BRUCH, GEORGE REEVES AND JOHN MATTHEWS,

Petitioners,

v.

CHARLES HEBARD AND THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,

Respondents.

MOTION TO HEAR IMMEDIATELY AFTER HEARING OF ORIGINAL CASE NO. 4, ASSIGNED FOR ARGUMENT OCTOBER 13, 1914.

To the Honorable the Supreme Court of the United States:

The Respondent, the Smoky Mountain Land, Lumber and Improvement Company, now comes and moves the Court to assign the above-entitled case for hearing immediately after the case of The State of North Carolina v. The State of Tennessee, a case of original jurisdiction pending in this court and being Original Case No. 4, which case has been set by the

Court to be heard on October 13, 1914, for the following reasons:

This case (No. 232, October Term, 1913) was to have been heard on March 5, 1914. However, upon motion of Petitioners, Hopkins, et al., to continue this case for hearing immediately after the said case of The State of North Carolina v. The State of Tennessee, which motion was presented to this Court on March 4, 1914, and upon the further request to the same purpose made at the same time to this Court by the Attorney Generals of the respective States of North Carolina and Tennessee, this case was ordered by the Court to be continued until October Term, 1914.

At the time said order was made, no date had been set for the hearing of the case The State of North Carolina v. The State of Tennessee, but on April 13th last this Court assigned the said case of The State of North Carolina v. The State of Tennessee to be heard on October 13, 1914. The said case of The State of North Carolina v. The State of Tennessee, and this case (No. 232, October Term, 1913), primarily, involve the true location of a part of the boundary line between the States of North Carolina and Tennessee. This case was admitted to this court upon a writ of certiorari.

The reasons stated for continuing this case therefor it appears will be fully met in granting this motion and the cause expedited thereby.

THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,

By

JOHN FRANKLIN SHIELDS,
WILLIAM A. STONE,
T. E. H. MCCROSKEY,
Attorneys.

the evidence be persuasive of error in the former decree the bill of relief should not be allowed if it should result in mischief to innocent parties.

Notwithstanding this court has recently decided, in an action between North Carolina and Tennessee, that the boundary between them is different from that which the Circuit Court of Appeals had previously adjudged it to be in cases affecting titles to land now owned by third parties relying on the decrees of that court, it will not now overturn those decisions, as the stability of judgments and the protection of rights acquired in reliance upon them would, under the circumstances of this case, make the review inequitable.

194 Fed. Rep. 301, refusing a bill to review 103 Fed. Rep. 531, affirmed.

THE facts, which involve the principles controlling the granting of bills of review in cases affecting title to land, and their application to property the title to which is claimed under grants of different States, the boundary between which has long been in dispute, are stated in the opinion.

Mr. C. B. Matthews for petitioners.

Mr. John Franklin Shields and *Mr. William A. Stone*, with whom *Mr. T. E. H. McCroskey* was on the brief, for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

In 1907, petitioners, alleged successors to David W. Belding and others, filed a bill of review against the heirs and representatives of Charles Hebard in the United States Circuit Court, Eastern District of Tennessee, wherein they sought to reverse the decree for complainant granted by the same court, June 10, 1899, and later affirmed by the Circuit Court of Appeals in the cause entitled *Hebard* v. *Belding*, which was instituted to determine the title to some seven thousand acres of mountain land. The Smoky Mountain Land, Lumber and Improvement Company intervened, denied the alleged equities

and set up that it had purchased the property for value and in good faith. The trial court having heard the matter upon the pleadings and evidence dismissed the bill; and this was affirmed by the Circuit Court of Appeals (194 Fed. Rep. 301). The cause is here upon certiorari.

The land in controversy lies on the waters of Slick Rock Creek, an affluent of the Little Tennessee River, and for some time prior to 1895 was claimed by Hebard under a grant from the State of Tennessee. Belding and others claimed it under a North Carolina grant. The rights of the disputants depended on the true location of the dividing line between the two States. If, after crossing the Little Tennessee, the line ran southward along Hangover ridge, the land was within Tennessee and belonged to Hebard; if, on the other hand, it ran along Slick Rock Creek the North Carolina grant was good and Belding and others were the owners. In 1895 Hebard began a suit in the Chancery Court, Monroe County, Tennessee, seeking an adjudication of his rights. This was removed to the United States Circuit Court; elaborate proofs were taken; and, upon the hearing, the court determined that the state line ran along Hangover ridge, as contended by Hebard, and adjudged the title to be in him. The Circuit Court of Appeals in a final decree, entered July 13, 1900, affirmed this action, the opinion being written by the late Mr. Justice Lurton (103 Fed. Rep. 532).

Some years before the present suit was brought, The Smoky Mountain Land, Lumber and Improvement Company, relying upon the last-mentioned final decree in the Circuit Court of Appeals, in good faith and for value, acquired the interest of Hebard. As security for debt, Belding and others, by deeds of December, 1899, and March, 1900, transferred to Archer and McGarry, Trustees, with power of sale, their interest in a large tract of land the boundaries of which included the seven thousand acres now in question "subject nevertheless to all deduc-

tions, if any, arising by, through or under the 'State Line' suit hereinafter mentioned" (*Hebard* v. *Belding*). Default having occurred, the trustees executed a deed to William R. Hopkins and others, petitioners here, with covenants of seisin and right to convey and special warranty; but from the covenants they expressly excepted "all those lands situated at or near the State Line, between the State of North Carolina and Tennessee, which were recovered in a certain action known as the 'State Line Suit' which was pending in the United States Circuit Court for the Eastern District of Tennessee and was brought by one Hebard against David W. Belding and others if future proceedings do not recover the title thereof."

During the year 1821 Commissioners appointed by North Carolina and Tennessee located and marked the southern portion of the dividing line between the two States and prepared a map roughly indicating it. After being lost for many years, in December, 1903, or early in 1904, this was found among old, discarded papers stored in the basement of the Capitol at Nashville. Relying on the map as newly discovered evidence adequate, when considered in connection with that formerly introduced, to demonstrate that the dividing line between the two States ran along Slick Rock Creek and to establish the invalidity of the Tennessee grant under which Hebard claimed, petitioners began the present proceeding.

Likewise relying in part upon the same map, the State of North Carolina in March, 1909, presented an original bill in this court against Tennessee, claiming that the true line between them ran along Slick Rock Creek, and praying an adjudication to that effect. In an opinion recently announced, the contention of North Carolina was sustained. *North Carolina* v. *Tennessee*, *ante*, p. 1.

The function of a bill of review filed for newly discovered evidence is to relieve a meritorious complainant from a

clear miscarriage of justice where the court is able to see upon a view of all the circumstances that the remedy can be applied without mischief to the rights of innocent parties and without unduly jeopardizing the stability of judicial decrees. The remedy is not a matter of absolute right but of sound discretion. *Thomas* v. *Harvie's Heirs*, 10 Wheat. 146; *Ricker* v. *Powell*, 100 U. S. 104, 107; *Craig* v. *Smith*, 100 U. S. 226, 233; 2 Daniell's Ch. Pr. *1577; Story's Eq. Pl., § 417; Street's Fed. Eq. Pr., §§ 2143, 2156, 2159; Gibson's Suits in Chancery, §§ 1058, 1062.

The trial court regarded the newly-discovered evidence as favorable, rather than in opposition, to the original decree and accordingly dismissed the petitioners' bill. The Circuit Court of Appeals, in a well-considered opinion, upheld the result but for a different reason, saying (194 Fed. Rep. 301, 310): "In our opinion, taking into account not only the speculative purchase by appellants, but also the good-faith purchase by the Smoky Mountain Company, a case is not presented which appeals to the equitable discretion of the court to allow the review of a decree upon the ground alone of newly discovered evidence. We rest our decision solely upon this proposition. Bearing in mind the rule that this bill of review for newly discovered evidence is not of right, no matter how persuasive of error in the original decree the new evidence may be, and that it should not be allowed if such allowance would result in mischief to innocent parties, and having in view the stability necessary to be afforded to decrees, especially of courts of last resort, where disturbance thereof is not essential to the protection of the real equities of the parties before the court, we think the review asked for should be denied. In our opinion, the stability of judgments, and thus the protection of rights acquired in reliance upon them, are such as, under the peculiar circumstances of this case, to make the review asked for inequitable."

Notwithstanding our conclusion in the proceeding between the States of North Carolina and Tennessee, where the established facts in respect to the location of the dividing line were for the most part the same as those disclosed in the record now before us, we think the decree of the Circuit Court of Appeals was right and it is accordingly

Affirmed.

MR. JUSTICE DAY took no part in the consideration and decision of this case.